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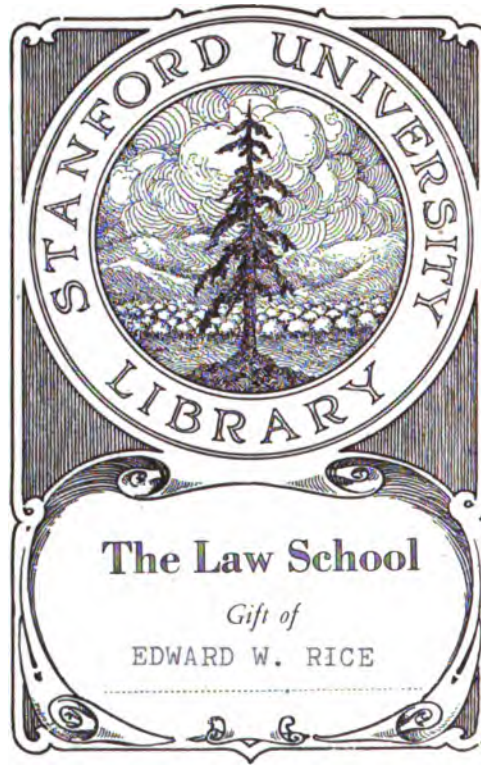
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THE LAW OF SCOTLAND

RELATIVE TO

PARENT AND CHILD

AND

GUARDIAN AND WARD.

MURRAY AND GIBB, PRINTERS, EDINBURGH.

A TREATISE ON THE LAW OF SCOTLAND

RELATIVE TO

PARENT AND CHILD

AND

GUARDIAN AND WARD.

BY

PATRICK FRASER,

ADVOCATE.

SECOND EDITION,

BY HUGH COWAN,

ADVOCATE.

EDINBURGH:

T. & T. CLARK, LAW BOOKSELLERS, GEORGE STREET.

LONDON: STEVENS AND SONS. GLASGOW: J. SMITH AND SON.

MDCCCLXVI.

PREFACE.

THIS Treatise was first published as part of a larger work, which embraced, besides it, the Law of Husband and Wife and Master and Servant. There is no necessary connection between the various subjects in that work; and in the presence of impending changes in the Law of Marriage, it might prove to be labour lost, to re-edit and publish at present, a new edition of the Treatise on the Law of Husband and Wife. I have therefore thought it best, at once to publish this book by itself; and in so doing I have to acknowledge my obligations to my friends Mr Hugh Cowan and Mr Richard Vary Campbell, Advocates, for the valuable assistance which they have given me, in my endeavour to present an accurate representation of the law as at the present time. Mr Cowan gave me the benefit of his painstaking industry in the revision of the volume to near its close; and when, in consequence of official duties, he was unable to continue his labour, I was fortunate in securing the aid of Mr Campbell, who has almost re-written and very greatly improved the last chapter of the work.

P. F.

EDINBURGH, *April* 1866.

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ALEXANDER. Abridgment of the Acts of Sederunt of the Lords of Council and Session. By William Alexander, W.S. Edin. 1838.

ARGENTRÆUS. Commentarii de Donationibus, de jure Connubiorum, de Bastardis et Legitimatione, de Minoribus, et eorum emancipationibus. Paris, 1605.

BALFOUR. Practicks; or, A System of the more ancient law of Scotland. Compiled by Sir James Balfour of Pittendreich, Lord President of the Court of Session. Edin. 1754.

BANKT. An Institute of the Laws of Scotland in Civil Rights, with Observations upon the Agreement or Diversity between them and the Laws of England. In Four Books. By Andrew M'Douall, Lord Bankton. Edin. 1751. 3 vols.

BAR. Das Internationale Privat- und Straf-recht. Von Dr L. Bar, Königl. Hanoverschem Gerichts-Assessor. Hanover, 1862.

This is one of the best works that has been recently published on the subject of Private International Law. Fœlix and Gand are useful, but neither of them is equal to Dr Bar, the Assessor of the Royal Court at Hanover. The work was published there in 1862. The author seems to be a man of great erudition, and thoroughly acquainted with the whole legal literature of the important branch of law on which he treats. His book is a learned and well-digested treatise. He had, no doubt, the advantage of having as his model and guide the able and interesting Treatise of Savigny, who for the first time in modern days brought to this subject original thought. In Savigny's System of the Roman Private Law as at the Present Time (System des heutigen Römischen Rechts), he devotes a volume to the consideration of private international law, in which he exhibits all the genius and power which have placed him at the head of scientific jurists in modern days, and given him a place equal to that occupied in former times by Cujacius. I do not know any contributions to legal literature more valuable than these two books of Bar and Savigny; and a great service would be rendered to all those countries where the English language is spoken, were they translated into English. I recommend to some one of my friends at the bar, who are suffering the enforced leisure usual in early professional life, to undertake the task of this translation. I venture to predict that the undertaking would in every way be profitable to themselves, and a successful speculation in a bookseller's point of view, as the book would be useful not only within the British dominions, but in America. The works of Story and Burge are simply collections of citations, and of inconsistent and

dogmatic opinions of a great number of mediæval jurists—very useful, no doubt, as raw material, but as nothing more. Story and Burge were very excellent pioneers in this branch of legal learning; but it was left for Bar and Savigny to bring order out of the chaos, and to give us digested, thoughtful, and philosophical treatises.

I regret that, when dealing with international law as to legitimacy, I was unacquainted with Bar's work. If I had then known of it, I would certainly have largely used it for that chapter of this book. Savigny's entire work has been translated into French by M. Guenoux, and published at Paris by Firmin Didot Frères in the year 1851. The whole of Savigny's eight volumes need not be translated. The one on International Law is independent of the rest of the work, though an introduction explaining his system would make his eighth volume on International Law more intelligible.

In connection with this subject, I may mention that a work was begun in a very original spirit by an American lawyer (Livermore); but he lived to print only seventy pages of it. These gave great promise of a sterling book. The late Professor More possessed a copy of this little book, which he very liberally lent to his professional brethren. I have not been able to trace where this copy has gone to, and have been unable to procure in America another copy. Livermore's short essay deserves republication.

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Though this book is entered in the Faculty Catalogue as the Major Practicks of Sir Thomas Hope, there may be reason to doubt whether this is correct. When the first edition of the present work was published, the late Lord Justice-Clerk Hope asked me to inform him where he could see the Major Practicks which he found sometimes referred to in it; and upon my stating that I had found a MS. volume so described in the collection of the Advocates' MSS., he informed me that this was a mistake, and added that 'I once intended to print that work of my ancestor, but gave it up on finding that no manuscript of it could be found. The copy in the Advocates' Library—and the one I have myself from the Arniston Library, and others—turned out to be by one of his sons—Sir Thomas Hope of Kerse, I think—and referred to "*my father's* MSS. *Ps.*" Lord Tweeddale may have a copy;—but if not, I do not know where any authentic manuscript is to be found. In the Advocates' Library, the manuscript called Sir T. Hope's Practicks is, like Balfour's Practicks, only a collection; and at all events was the compilation of Sir Thomas' son. Sir Thomas died in 1648–9. I may mention that the opinions quoted from Sir Thomas' Major Practicks by Stair, are not to be found in any manuscript now known. Erskine never saw the real Major Practicks.'

The Library Catalogue, in which the book is described as Hope's Major Practicks, was prepared by Mr Cosmo Innes, and he is bound to justify his opinion

by good reasons, or by producing the genuine book. The MS. book in the Library is dated 1656—eight years after the author's death. Recently (1865) a number of old books were presented to the Advocates' Library by the Trustees of the Dollar Institution, and among these was found a manuscript volume, written probably in the first half of the eighteenth century, titled on the back, 'Hope's Major Practicks, vol. ii.' On comparing the two, Mr Halkett, our learned librarian, found that they were essentially the same in every important particular, though there is a slight difference in the way in which the matter is arranged under the different titles, showing that the Dollar volume (which belonged to Lord Justice-Clerk Areskine) was copied from a different manuscript than the copy in the Advocates' Library. But still, the reasons assigned by Lord Justice-Clerk Hope, against accepting either volume as the Major Practicks of Sir Thomas Hope, are too cogent to be resisted.

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PARENT AND CHILD.

CHAPTER I.

LEGITIMACY.

LEGITIMACY is the status of a party who has been born in a lawful manner, that is, in a manner approved of by the law (*a*). The only mode approved of by the law of Scotland is,—*marriage*. Lord Meadowbank, however, in a noted case, once said that 'it is an obvious fallacy to maintain, that excepting through the medium of marriage there is no legitimacy' (*b*). But this dictum must be taken with reference to the case then under consideration. The learned judge referred to the *exception* to the rule. On grounds of expediency and humanity the law recognises as legitimate the issue of a putative marriage (*infra*, p. 22); but it has never gone beyond that *special* case, in the recognition of legitimacy where there was no marriage (*c*).

Legitimacy from lawful marriage.

I. The general rule of law is, that a child is legitimate who is born in lawful wedlock, or within a certain short period after the marriage is dissolved; according to the maxim, *Pater est quem nuptiæ demonstrant* (*d*). 'The birth,' says Lord President Blair (*e*), 'is a fact which may be proved by witnesses; but the conception is a fact that can never be proved, and the claimant therefore stands in the same position as every other man possessing the legal character of legitimacy. He proves that he is born of this lady; and having proved

(*a*) Etat d'un enfant qui a reçu la naissance d'une manière legitime, c'est à dire, approuvée par la loi. Merlin Repertoire, *v.* Legitimité.

(*b*) Bell's Report, Putative Mar. pp. 191, 192.

(*c*) The cases referred to *infra*, p. 30, rest as yet on juridical speculation.

(*d*) Stair iii. 3, 42; Bankt. iii. 3, 98; Ersk. i. 6, 49.

(*e*) *Routledge* v. *Carruthers*, 19 May 1812, F. C. p. 588.

this, the law takes him under its protection, and says, *Pater est quem nuptiæ demonstrant.* It refers to a plain and sensible maxim, which is the corner-stone, the very foundation on which rests the whole fabric of human society.' 'In a word,' says D'Aguesseau, 'it is sufficient for a child to show that he is born during the marriage. The law draws for him, from that, the necessary consequence—he is legitimate' (*a*). 'The mother,' says this distinguished jurist in another of his pleadings, 'is always certain, the father is uncertain. Where, amid so much uncertainty, shall we find the rule for fixing the status of children, except in the legal presumption which arises from marriage, in favour of those who are born under its sacred protection?' (*b*). Boullenois thus refers to the same maxim: 'There is a maxim recognised by all nations, which is the peace and tranquillity of states and families—*Pater est quem nuptiæ demonstrant.* When a child is born during a marriage legitimately and validly contracted, it is on that ground, and by a legal presumption, the fruit of the marriage, and the child of him who is the husband of the mother *si non jure seminis, saltem jure soli,* and in the same way as the produce of ground belongs to the owner' (*c*). It has been once decided that the rule is not applicable to clandestine marriages (*d*), nor to the case of a party born before marriage (*e*). This rule applies with conclusive force only to those who are born at such time as they might have been conceived during the marriage. Accordingly, it does not apply to one born beyond ten months after the marriage is dissolved, or within six months after it is entered into (*f*). Where a widow alleges that she is left pregnant, an application may be made to the Court (if there be any suspicious circumstances to warrant such an unusual proceeding), *de ventre inspiciendo.* This is authorized by express statute (*g*),

(*a*) Plaidoyers, tome iii. p. 173.

(*b*) Plaidoyers, tome ii. p. 529; Evans' Pothier, vol. ii. p. 454.

(*c*) Boullenois, Traite des Statuts, tome i. p. 62.

(*d*) *Baptie* v. *Barclay*, M. 8413 (1665); Craig ii. 18, 21; Tait on Evidence, p. 489. But see Stair, *contra*, iii. 3, 42, and iv. 45, 20.

(*e*) *Innes* v. *Innes*, 7 July 1835, aff. 20 Feb. 1837, 2 S. and M'L. 417.

(*f*) See these authorities: D'Aguesseau iii. 180; Bankt. i. 2, 3; Ersk. i. 6, 49 and 50; Wall. 264; *Watson* v. *Brown*, Hume 488 (1802); *Aitken* v. *Mitchell*, Hume 489 (1806), as contrasted with *Gourlay*, Hume 483 (1796); *Jobson* v. *Reid*, 31 May 1832, 10 S. 594. And see *infra*, p. 11, as in (*b*).

(*g*) Stat. 2 Rob. I. c. 27, Skene's Coll.

has been sanctioned by decision, appears to have been borrowed from the Roman law (*a*), and is in accordance with English practice (*b*). Such a warrant was granted in a case before the Commissaries at the beginning of this century (*c*). In the course of a process of declarator of marriage and legitimacy, the defender received from the female pursuer a letter stating that she was again with child to him. He thereupon presented a petition to the Court, praying to have her examined. No objection was offered to the competency of the proceeding; and the Commissaries (*d*) 'granted warrant and commission to the Lord Mayor or any of the aldermen of the city of Dublin to appoint physicians, surgeons, or midwives, to visit and inspect the person of the said Sophia O'Neil, and to report before them or either of them whether or not the said Sophia O'Neil is at present in a state of pregnancy, and how far from appearances she may be advanced in her pregnancy; and to report.' Evidence of a similar character was tendered in a recent case of divorce; but as it related to a person who was not a party to the cause, it was rejected. The woman with whom the defender was said to have committed adultery, in her examination denied having ever had connection with the defender, and averred that she was *virgo intacta*. The evidence of an eminent medical practitioner who had examined her person was tendered in support of this allegation; but the Court refused to receive his evidence, 'because the examination was *ex parte*: the person examined is not a party to the suit; and the defender has obtained an advantage by the will of the witness, while we have no power of compelling her to grant a like advantage to the other side' (*e*). On the general question of the competency of such evidence in certain cases, the following observations are important.

(*a*) Dig. lib. xxv. tit. 4. *Ross* v. *Gray*, M. 16455 (1699).

(*b*) M'Pherson on Infants, 568; Nicolas, Ad. Bastardy, pp. 15 *seq.*

(*c*) Declar. of Marr. and Legit., *Sophia O'Neil and Children* v. *Captain John Jameson*, 17 July 1801, MS. Com. Edin. Cons. Decreets, vol. xxv. p. 1061, Register House. In *Kinnaird* v. *Kinnaird*, 1 Jan. 1748, MS. Com. Edin. Cons. Decreets, vol. ix. p. 1, there is a similar conclusion for inspection of the body of Lady Kinnaird; but the question there related not to a state of present pregnancy, but to an allegation of her having given birth to children. No objection was stated to the competency of this conclusion; but as the decision in favour of the pursuer turned upon another point, it was unnecessary to pronounce the order concluded for.

(*d*) 28 June 1800, p. 1145 of volume.

(*e*) *Davidson* v. *Davidson*, 11 Feb. 1860, 22 D. 749.

After adverting to the practice of allowing such examination in cases of rape, the Lord President (M'Neill) said: 'There may be other cases also in which a woman, if she is a party claiming rights or defending herself, may have such an interest as will either give a right to another against whom she complains, or entitle herself to require that this kind of evidence shall be taken, of whatever value it may be.' And Lord Curriehill observed: 'It is of great importance in this matter to keep in view the distinction between cases where the person to be examined is a party to the suit, and cases in which he is not. We have no occasion now to consider whether this evidence would be admissible were that person pursuer or defender.'

The rule, *Pater est quem nuptiæ demonstrant*, creates merely a *presumptio juris*, which may be redargued by contrary proof, showing that the child cannot be the issue of the husband and wife. The grounds upon which the presumption may be overthrown, resolve themselves into two: 1. That the husband could not have had sexual intercourse with his wife, by reason of his impotency; and, 2. That having the power, he had in fact no sexual intercourse with her at the time of the conception (*a*).

Impotency.

1. On the ground of impotency, marriages have often been annulled (*b*); but few cases have occurred where impotency was brought under consideration in regard to a question of legitimacy of children (*c*). The law is, however, settled, that illegitimacy may be found if the father be impotent (*d*). In one case, an action of bastardy was raised against a party after his father's death, on the ground of the latter's impotency; and an inspection was made of

(*a*) D'Aguesseau ii. 529; Dig. i. 6, 6. Filium eum definimus qui ex viro et uxore ejus nascitur. Sed si fingamus abfuisse maritum, verbi gratia per decennium, reversum anniculum invenisse in domo sua; placet nobis Juliani sententia hunc non esse mariti filium. Sed si constet maritum aliquamdiu cum uxore non concubuisse, infirmitate interveniente vel alia causa; vel si ea valetudine paterfamilias fuit, ut generare non possit; hunc qui in domo natus est, licet vicinis scientibus, filium non esse.

(*b*) See the authorities collected in Fraser on Husband and Wife, 2d edition.

(*c*) In the case of *Legge* v. *Edmond*, 1856, 25 L. J. Chan. 125, it was decided that where physical incapacity is satisfactorily made out, proof of the adultery of the wife is still important, as, were she of irreproachable character, this would modify the weight of the evidence as to incapacity.

(*d*) Stair iii. 3, 42; Ersk. i. 6, 50; *A. B.* v. *C. D.*, 18 July 1863, 1 Macph. 1163.

the father's corpse, with the view of ascertaining if he were *potens ad actum copulandi* (*a*). The same point arose in the case of *Sandy*, and a proof was allowed as to the state of the husband from the date of the marriage till his death; but the evidence on this part of the case was not conclusive (*b*).

Where the husband, being capable, had not sexual intercourse.

2. The proved *absence* of the husband during the period when, according to the laws of nature, the child must have been conceived, is conclusive of its illegitimacy (*c*). This absence must be at such a distance as to place it beyond a doubt that the husband could not have met with the wife, and have had opportunity of intercourse at the time of conception; or if within a nearer distance, he must be proved to have been so situated, as in prison or other-

(*a*) *Dundas* v. *Dundas*, 1705, Fountainhall's Decis. vol. ii. pp. 283–4, M. 4085. See some particulars as to this case in Riddell, Peer. and Cons. Law, p. 545, note. History furnishes an illustration of this.—Robertson, Chas. v. vol. ii. p. 2.

(*b*) *Sandy* v. *Sandy*, 4 July 1823, 2 S. 453, Sess. Papers.

(*c*) This is well illustrated by the case of *Tulloh* v. *Tulloh*, 28 Feb. 1861, 23 D. 641, where the question was debated in regard to the relevancy of a summons, which averred that after a contract of separation the pursuer and defender lived absolutely and invariably separate, and which set forth in detail, and with great precision, where the pursuer lived between 1848 and the date of the action, and where the defender lived during the same period, and also the dates of the births of three children born during that period; the inference being drawn from the residences of the pursuer and defender during that period, that the children could not possibly be the issue of the pursuer. The Court, in conformity with the judgment of the Lord Ordinary (Ardmillan), sustained the relevancy of the summons. The Lord Justice-Clerk (Inglis) observed: 'There is a complete and satisfactory series of averments, that from 1849 to 1859 the pursuer and defender not only never met, but could not possibly have met in this sense—that they never were in the same country. There was therefore, in point of fact, an impossibility of access, if these averments are true. . . . If the averments here be true, it follows of necessity that the pursuer cannot be the father of these three children, and from that it follows of necessity that the defender must have committed adultery; and therefore, holding these averments to be absolutely inconsistent with anything else than the adultery of the wife, I cannot refuse to sustain the relevancy.' Lord Cowan observed: 'It is said that to sustain these averments as relevant, and allow them to be proved, would be to interfere with the principle on which is founded the maxim, *pater est quem nuptiæ demonstrant*. But that rule is not without exception. There is in England a rule, that the maxim is not to be interfered with, unless the husband be shown not to have been within the four seas; but with us, as it is laid down by Lord Stair, it is sufficient if the husband's absence is made so clear, that he could not have been with his wife at the conception of the child. His words are, "With us it will be sufficient that his absence be special and circumstantiate, so that there re-

wise, that the witnesses conclusively establish that he never had opportunity of intercourse. In England, the absence of the husband formerly required to be *extra quatuor maria* (*a*); but the absence does not require to be continued during the whole period, from the conception down to the birth; it is enough if it be down to a period so recently before the birth as to render it impossible that he could be the father (*b*). The rule of the modern law of Scotland appears to be, that the Courts, in judging whether there was sexual intercourse between husband and wife, are entitled not only to take into consideration proofs tending to show the *physical* impossibility, from the husband's *absence*, of the child born in wedlock being his; but they may decide the question of paternity, by attending to the relative situation of the parties, their habits of life, the evidence of conduct, and of declarations connected with conduct, and to every induction which reason suggests, for determining the question of

maineth no doubt that he could not have been present." This affords a good general principle by which to test the relevancy of the pursuer's averments. It is enough for me, that it is averred that the parties were so placed, the one in Ireland and the other out of Ireland, that the pursuer could not have been the father of the children; and as the children must have had a father, it follows that the mother must have committed adultery in their conception.'

(*a*) The Lord Chancellor (Erskine) remarked, in *Shelley* v. ——, 1806, 13 Vesey 56: 'The law of England has been more scrupulous upon the subject of legitimacy than any other, to the extent even of disturbing the rules of reason. Formerly access was presumed, if the parties were within the narrow seas, though there was no doubt of the contrary. Since that time, access or non-access must be proved like any other fact; but it must be proved by witnesses, who altogether establish that, though each speaks only to some particular circumstances.' See *Pendrell* v. *Pendrell*, 2 Str. 925; *Head* v. *Head*, 1823, 1 Sim. and Stu. 150, as showing that the presumption of access and its consequences prevails, unless the evidence raises an irresistible presumption the other way. In *Plowes* v. *Bossey*, 1862, 8 Jur. N. S. 352, 31 L. J. Chan. 681, 10 W. R. 332, and *Hargrave* v. *Hargrave*, 1846, 9 Beav. 552, it was laid down that the child of a married woman must be presumed to be the child of the husband, unless it is proved, beyond all reasonable or serious doubt, that no sexual intercourse could have taken place at the time within which the husband could be the father; and the onus of showing this lies entirely on those asserting the illegitimacy. See also *Atchley* v. *Sprigg*, 1864, 33 L. J. Chan. 345.

(*b*) Lord Ellenborough in *King* v. *Luffe*, 1807, 8 East 193, and Nicolas, p. 171, where the absence was to within fourteen days of the birth; followed by *King* v. *The Inhab. of Maidstone*, 1810, Nicolas, p. 180, where it was to within one hundred and twenty-one days of the birth; and in neither of these was the legitimacy sustained.

fact whether sexual intercourse had taken place between two parties (*a*). Such appears to be the rule derivable from the last reported decisions (*b*); more especially when taken in connection with the decision of the House of Lords in the great case of the Banbury Peerage, where the husband and wife occupied the same house at the very time the child must have been begotten, and yet that child was held not to be the child of the husband. There was, moreover, no evidence to show that they occupied separate beds; and there was nothing that made it *physically* impossible for the Earl of Banbury, the husband, to have been the father. But there was a mass of evidence adduced, which left no moral doubt that he could not have been the father; and, on the ground of the *moral impossibility* of sustaining the legitimacy of the child, looking to the whole conduct of the parties before and after the birth, the House of Lords, after the most elaborate argument, denied it (*c*). The law laid down in this case was afterwards confirmed by another, which underwent the ordeal of two jury trials, and was ordered for a third, when the parties referred it to the Lord Chancellor Lyndhurst, from whose judgment it was carried by appeal to the House of Lords. The husband and wife voluntarily separated, but the husband resided at a distance of only fifteen miles, and sometimes visited her, and had opportunities of sexual intercourse. She was delivered of a child during the separation, and there was nothing *physically* impossible in the husband being the father; but, looking again at the conduct of the wife and that of the supposed paramour

(*a*) The inflexible rule of the old English law was, that the presumption of the husband's being the father could only be overcome by proof of absence beyond seas, or of impotence. But cases where children were born of adultery during coverture were met by Acts of Parliament declaring such children illegitimate.—Nicolas, pp. 59, 68, 83, etc. And the proceedings in the great *Villiers* cause, fully reported by Nicolas (pp. 90–117), show that at that period—*cir.* 1670—the House of Lords were then coming round to a truer view of the just rights of parties, being willing to bring in a bill of bastardy, where the proof was such as to convince them that the *de jure* son was not *de facto* a son of the husband.

(*b*) *Sandy* v. *Sandy*, 4 July 1823, 2 Shaw 453; *Innes* v. *Innes*, *supra*, p. 2; *Webster* v. *Mackay*, 24 Feb. 1855, 17 D. 494.

(*c*) See it stated in Nicolas on Adulterine Bastardy, p. 181, a volume written to show that it entirely overturns the old law of England. Also see it in 5 Clark and Finn 229, 230. Le Marchant, Gardner Peerage Case, App. Edinr. Review, vol. xlix. p. 190. Law Magazine, vol. iv. p. 25. See also Lord Eldon's remarks, Nicolas, p. 208.

before and after the birth, it was held morally impossible that the husband could have been the father of the child. The birth was concealed from him, and the paramour acknowledged it as his, and bequeathed his property to it; and on these and other grounds, the child was declared a bastard (*a*). The law was thus laid down: 'The case, therefore, comes back to the question of fact. Are the circumstances of this case such as ought to satisfy the person who has to decide upon it, that sexual intercourse did not take place between Mr and Mrs Morris in the spring of 1792?'—the date of conception (*b*). With the exception of Craig and Stair (*c*), the institutional writers on the law of Scotland (*d*), and authoritative judicial dicta, require a physical impossibility, in order to overturn the presumption of legitimacy. But this doctrine has not received the countenance of recent decisions. On the contrary, in two modern Scotch cases, the doctrine insisted on by the House of Lords has been recognised. In the first, the legitimacy of the child depended on the question of fact, whether or not the husband had sexual intercourse, and was the person who had begotten the child. As appears from the evidence preserved in the Session Papers, the parties occupied the same bed; and though there was an allegation of impotence, it failed on the proof, and there was no evidence to show that sexual intercourse could not have taken place. It appeared, however, that the woman, prior to her marriage, had been a person of loose character, and was a convicted thief; that during marriage she was seen to have connection with another than her husband; that after marriage she declared that she was not pregnant; that another man declared the child was his, and that the woman accepted money for its support from him; and that, while the process was pending, she gave birth to a bastard. The Court held the child to be illegitimate, although there was no impotency,

(*a*) *Morris* v. *Davies*, 1837, in Nicolas, p. 216, and 5 Clark and Finn 463.

(*b*) The principles established in these cases have since been acted on in other cases: *The Barony of Saye and Sele*, 1848, 1 Clark and Fin. (N.S.) 507; *Sibbett* v. *Ainsley*, 3 Law Times (N. S.) 583 Q. B.,—a very strong case, where the husband and wife were living in the same town; *Gurney* v. *Gurney*, 1863, 8 L. T. (N. S.) 380.

(*c*) Craig ii. 18, 1[illegible] and 20, and Bell, Prin. 1626; Stair iii. 3, 42.

(*d*) Stair iii. 3, 42; Bankt. iii. 3, 98; Ersk. Prin. i. 7, 36, which is more precise than his Institutes, i. 6, 50; Wall. p. 263; Bell's Dict. *v.* Legitimacy; Hutch. Just. ii. 248; Tait on Ev. 489; Ferg. Cons. Law 199.

and no physical impossibility that the husband could be the father of the child, but the circumstances rendered it *morally* certain that the child was a bastard (*a*). The same doctrine was afterwards fully recognised, and the child held to be bastard, in a case where there was no proof of physical impossibility of connection. The mother, however, was a person of loose character, and had previously borne a bastard child; there were repeated and unequivocal declarations both by her and by her husband that the claimant was not his child, and he made a settlement in which he passed her over, and left his property to his nephews. The Lord President (M'Neill) said: 'I think that the law of this case is well laid down by the Lord Ordinary. There is a strong presumption in favour of the legitimacy of a child born in wedlock—that is, that the child of a married woman is legitimate. But that presumption must yield to evidence. It may be rebutted and overcome; it must yield to counter evidence. We are told that in a neighbouring kingdom it could, for a length of time at least, only be rebutted by the impossibility of intercourse between husband and wife; and that impossibility could only be deduced from certain physical difficulties of their coming together. I do not think that has at any time been our law. The law of Scotland has held the presumption to be very strong indeed of the legitimacy of the children, but it has permitted that presumption to be rebutted by such evidence of illegitimacy as is sufficient to satisfy the minds of reasonable people that the husband could not be the father of the child. In that respect, as I read the cases to which we have been referred on that point, the law of England has recently been tending. But with that we have no concern. We take the law as we have it here; and I do not see that it has ever required the element of physical impossibility in order to support the plea of illegitimacy.

'The Lord Ordinary has said in his note: "It appears to be now completely established, that although the important legal presumption remains in full strength and effect, there is considerable relaxation as to the nature of the evidence by which that presumption

(*a*) *Sandy* v. *Sandy*, *supra*, p. 7. The child was born nine calendar months and twenty-nine days—three hundred and four days—after the death of the husband; but the Court did not proceed upon this, but expressly ruled that this 'is not sufficient *per se* to overthrow the presumption of the child's legitimacy.'

may be overcome. In particular, it appears to be established, that if there be such clear evidence as completely satisfies the tribunal which has to decide the question, that *de facto* a husband is not the father of his wife's child, that child will be held to be illegitimate, although neither impotency nor the utter impossibility of access be established by that evidence. Although it must generally be very difficult indeed to prove the legitimacy, unless there be evidence of the kind last mentioned, still neither of these things appear now to be indispensable ingredients of such evidence. Such, at least, appears to be the rule recognised by the House of Lords and the English courts, and the Lord Ordinary does not think that a different rule will be followed in this Court."

'That I hold to be the sound law of the case; and, therefore, going along with that proposition in law, and giving all due weight to the legal presumption, we must now apply our minds to the evidence, in order to determine whether it has overcome that presumption so clearly and satisfactorily as to leave no doubt that the father of this child was not the husband of its mother, and so to form an exception to the rule, *pater est quem nuptiæ demonstrant*' (*a*).

In another case, where strong opinions in favour of the old doctrine of *physical impossibility* were delivered, the circumstances did not require a reference to that principle to support the judgment, as the case appears to have been one where the husband and other parties having had intercourse with the wife about the same time, and within the proper period of gestation, whether ought the issue to be held legitimate or not? and it was of course decided in favour of the legitimacy (*b*), because it is an established rule, that if sexual intercourse be proved between husband and wife, the mere fact of its being also established that at the same time the wife allowed the embraces of another, will not render the child illegitimate (*c*). The law never presumes a crime: always favourable to innocence when the same effect may have two causes, the one criminal,

(*a*) *Webster* or *Mackay* v. *Mackay*, 24 Feb. 1855, 17 D. 494.

(*b*) *Routledge* v. *Carruthers*, 19 May 1812, F. C.; remitted 29 June 1816, 4 Dow 392; affirmed, 2 Bligh 692.

(*c*) Craig ii. 18, 20; Stair iii. 3, 42; Ersk. i. 6, 49; Wal. 263; *Wright* v. *Holdgate*, 1850, 3 Car. and K. N. P. 159; *Bury* v. *Philpot*, 1834, 2 Mylne and K. 349; *Cope* v. *Cope*, 1833, 5 Car. and P. 604, 1 M. and Rob. 269; *Reg.* v. *Mansfield*, 1841, 1 Q. B. 444, 1 G. and D. 71, 5 Jur. 565; *Hargrave* v. *Hargrave*, 1846, 9 Beav. 552, and 2 Car. and K. N. P. 701.

the other innocent and lawful, it absolutely rejects the former, and decides firmly in favour of the latter (*a*). But the Banbury case shows, that though the husband and wife be living together in the same house, this does not necessarily and in all circumstances prove that the husband had sexual intercourse.

Where husband absent, presumption of legitimacy arising from the period of gestation.

Where it is once clearly proved that the husband was absent from the wife, the law has established certain presumptions with reference to the period of the child's birth. If it were born within the tenth lunar month after the husband left the wife, or beyond the sixth lunar month of his return, it is presumed legitimate. This presumption has been borrowed from the Roman law (*b*), and is sanctioned by all the authorities (*c*). It may be mentioned, however, that there is a doubt whether the longer period should be ten *lunar* or ten *calendar* months. Conflicting judgments on this point were pronounced by Lords Gillies and Meadowbank, in the only case where the point arose for decision; but the general point was waived by the Court (*d*). This rule (which may be set aside, on its being established that the husband had not sexual intercourse with the wife) is only useful as excluding all questions as to whether gestation could have been completed

(*a*) D'Aguesseau iii. 180.

(*b*) Dig. i. 5, 12; Dig. xxxviii. 16, 3, 11; Dig. xxviii. 2, 29, Pr. Nov. 39; Code vi. 29, 4; Heinec. Pan. lib. i. tit. 6, Nos. 152, 153.

(*c*) Bankt. i. 2, 3; Wall. 264; Ersk. i. 6, 50; Ferg. Cons. Law 201. Stair writes loosely as to 'nine, ten, or eleven months.'—Stair iii. 3, 42, and iv. 45, 20. See dictum President Blair in *Routledge* v. *Carruthers*, *supra*, p. 1.

(*d*) *Sandy* v. *Sandy*, 4 July 1823, Shaw's Cases, 2d edit. See Ferg. Cons. Law, p. 201, and case there cited. The same point occurred incidentally in the case of *Innes* v. *Innes*, 20 Feb. 1837, 2 S. and M'L. 417; but the question there related to the legitimation *per subsequens matrimonium* of a child born three hundred and one days after the time, when, if Mr Innes was the father, it must have been conceived. The Lord Chancellor observed, p. 447: 'Now the state of the law or of medical science leads to this conclusion, that that is not conclusive against the legitimacy of a child born in marriage. It is within the period, as the counsel have stated, which other nations have assigned as the ultimate period of gestation. It is, however, very near the confines; but even in marriage, where any other evidence exists raising a question, it is always considered as a fact of the utmost importance, and which, coupled with other evidence, will be sufficient to show a child to be illegitimate, although the child have all the benefit of the legal presumption arising from the fact of the child being born in the marriage of the parents. To consider it, therefore, as anything less than a matter of extreme improbability, and requiring strong evidence to establish the fact of paternity, with such a fact against it, would be to contradict all that was said in the *Gardner* case, and everything in fact that is reasonable on such a subject.'

within these periods (*a*). But again, the presumption does not operate so as to render children illegitimate who have been born beyond the tenth lunar month after the husband left the wife, or within the sixth after his return to her society. In such a case, the onus is merely thrown upon the child to prove, that according to the laws of nature he could be the offspring of sexual intercourse between the husband and wife. The presumption, in short, is then against the legitimacy.

Period of gestation.

The law applicable to the period of utero gestation (*b*) is not settled with any precision; nor can it, from the nature of things, be otherwise. The common period of gestation is about ten lunar months, or forty weeks, or two hundred and eighty days (*c*); but there are instances of gestation protracted to the long period of three hundred and thirteen days, or forty-four weeks and five days (*d*). There is, however, no concurrence among medical men on this subject. A writer of authority on the subject justly observes: 'It is obvious that, in a medico-legal view, the only conclusion at which we can arrive is, that the period of gestation in the human female is not, as it was formerly supposed to be, a fixed and invariable term' (*e*). An admission on a reference to oath of connection with the pursuer eleven calendar months before the birth, was held to be negative of the reference, and the defender assoilzied (*f*). In an American case (*g*) this point arose for judicial determination; and the question of fact having been sent to a jury, they found the paternity proved. The judge who tried the case (Judge Lewis) observed: 'We are induced to believe that protracted gestation for the period of three

(*a*) *Elliot* v. *Scott*, 12 Feb. 1800, in Loth. 238, Hume 33; *Lindsay* v. *Leckie*, 1 Jan. 1797, in Loth. 238. See *Robertson* v. *Petrie*, 22 Dec. 1825, 4 S. 333.

(*b*) When spoken of by a lawyer, the 'period of gestation' means the time which intervenes between connection and the birth. When spoken of by medical men, it means the time which intervenes between the fecundation of the ovum and the birth of the child. Recent researches have shown that conception may not take place for several days after connection.—Wharton and Stille, Med. Jurisp. p. 251; Taylor, Med. Jurisp. 6th edit. pp. 613, 614.

(*c*) Beck's Med. Jurisp. p. 356, 7th edit.; Fodere, Med. Leg. vol. ii. p. 110; Paris and Forebl, p. 124; Ryan's Med. Jurisp. p. 135; Taylor, Med. Jurisp. p. 611.

(*d*) Med. Chir. Rev. vol. xxxiv. p. 556; Taylor, Man. p. 612. See two cases reported by Prof. J. Y. Simpson, Edin. Med. Journal, 1853, p. 52.

(*e*) Taylor, Med. Jurisp. p. 615.

(*f*) *Stewart* v. *M'Keand*, 1774, M. 11664.

(*g*) *Commonwealth* v. *Hoover*, 1846; Wharton and Stille, Med. Jur. p. 256.

hundred and thirteen days, although unusual and improbable, is not impossible. The evidence to establish the existence of such a considerable departure from the usual period, should be clear and free from doubt. The witness should possess a character beyond reproach, and her testimony should be consistent and uncontradicted in all material points. If the jury are satisfied that the evidence for the Commonwealth is of this character, the unusually long period of gestation does not require them to disregard it. The law fixes no *ultimum tempus pariendi.'* In the case of the Gardner peerage, the matter was judicially considered, in relation to a child who must have been born three hundred and eleven days after the conception, if the person alleged to be the father were in reality so. Eminent medical practitioners were examined on oath; and four of them, founding upon cases within their own experience, deponed that utero gestation might be protracted for ten calendar months, and a day or two beyond that. It was admitted on all hands, that the ordinary period is ten lunar months, or two hundred and eighty days; but the counsel supporting the legitimacy of the child maintained, from the evidence adduced, that this was not an invariable and inflexible rule; and having produced one case where this period was extended to three hundred and eleven days, they argued that this is evidence of the fact, in contradiction to all the theory and all the judgment of those who held that no such instance could by possibility occur. The House of Lords waived the decision of this question, and held the legitimacy not established upon other grounds (*a*). The question was also discussed in the Court of Session and House of Lords, in the case of *Innes*, where the child must have been born three hundred and one days after the conception. The Court, however, though they considered this an important element in the case, looking to the extreme improbability of the thing, would not hold the child illegitimate merely on that ground (*b*). In a later case of filiation of a bastard child, the Court held a gestation of three hundred and six days, or ten calendar months, to be so impro-

(*a*) Gardner peerage case, H. L., 1824; reported by Le Marchant in a separate volume, cited 5 Clark and Finn 248. See also Nicolas, pp. 209–216. It is proper to be noted that the Attorney-General, who was asked his opinion in the cause, held that the evidence did not clearly establish any cases of gestation protracted beyond two hundred and eighty days.

(*b*) *Innes* v. *Innes*, *supra*, p. 2.

bable, that they refused to declare the paternity on proof of this fact; and they drew a distinction between questions of this kind, in regard to the legitimacy of children born of a married woman, and those in regard to the filiation of bastards; holding that before the former can be declared to be illegitimate, the gestation must be proved *impossible* (as already explained, p. 6), while as respects the latter it was considered sufficient, if the gestation were *improbable*, to justify a refusal to declare a person the father of the child, so as to amerce him in its aliment (*a*). With regard to cases of early births, there are instances where the woman produced healthy children at the seventh month (*b*). A late writer says, that 'it is now universally admitted, that children born at the seventh month of gestation are capable of living, although more delicate' (*c*). If the child be born within six months, it could not exist (*d*). At six months and a half it would live (*e*). Instances are recorded by medical writers of births at even an earlier period (*f*), but the question has very rarely been discussed judicially (*g*). In an early case, the Commissaries held that 'ane madin bairne' born within 'sex monethis' after the divorce of the man from his former wife, 'wyt perfyte nailis upone tais and fingyearis as ye said bairne had ye tyme of ye birth,' was 'ane perfyte bairne borne to ye just maturitie and rypness,' and hence 'of necessitie three quarteris of ane zeir in ye moderis wombe after ye conceptionne;' and they therefore adjudged her to be adulterous and spurious, as conceived during the subsistence of the prior lawful marriage of the father, and so incapable of

(*a*) *Boyd* v. *Kerr*, 17 June 1843, 5 D. 1213.

(*b*) Beck's Med. Jurisp. p. 361.

(*c*) Taylor's Manual, p. 618.

(*d*) Beck, *ibid.*

(*e*) Taylor, *ibid.* p. 610.

(*f*) *Dr Rodnam's Case.*—Nineteen weeks—child survived one year and nine months; Guy's Med. Jurisp. p. 180; Taylor, p. 618. *Dr Barker's Case.*—One hundred and fifty-eight days—child survived at least three years and a half; Med. Times, Sept. and Oct. 1850. *A Case* reported in Lancet, April 1852.—One hundred and seventy-nine days—child survived four months, and then died of an epidemic disease. *Another Case.*—Twenty-seven weeks—child survived for more than eleven years; Heuke. Zeitschrift, vol. vi.; Wharton and Stille, Med. Jurisp. p. 260. See this subject treated by Dr Lindsay Bonnar in Edin. Med. Journ. Jan. 1865.

(*g*) The question came before the Church Courts in the celebrated *Kinghorn case*, where the child was born without any signs of immaturity, one hundred and seventy-four days after the marriage, but the libel was found not proven.—Med. Gaz. xvii. p. 92; Med. and Chir. Rev. xxxi. p. 424; Guy's Forens. Med. pp. 173 *seq.*; Taylor, p. 620; Assembly Papers, 1840.

being legitimated (*a*). In the case of a premature birth, medical writers are agreed that it is to be expected that the child born will not present all the characters of a mature child. Where a child having all the signs of maturity is born at or under seven months from the time of possible access of the husband, there is the strongest reason to believe that it is illegitimate (*b*); and, in like manner, when filiation is sought of a child born with all the signs of maturity within seven months after the date of proved connection, the claim of the pursuer will not be sustained (*c*). It may be stated as a general rule, that wherever the gestation is protracted to an unusual period, or where, after a six or seven months' gestation, a ripe child is born, other evidence will be sufficient, when added to such improbable circumstances, to bar the legitimacy, which would not, *per se*, have been effectual (*d*).

Effect of declarations of parents as to the legitimacy of the children.

The declarations of the parents as to the legitimacy of children, received by the Canon law greater weight than has been attributed to them in any other system. Such declarations, if emitted upon oath, denying the child's legitimacy, were held sufficient to bastardize it (*e*). This doctrine is adopted by Craig, Stair, and Bankton (*f*). Erskine hesitates upon the point; but he adds, that 'it is an agreed point by all writers, that if either of the two have, before making such oath, acknowledged the child as lawful, there is a right acquired to him by that acknowledgment which is not to be taken away by any posterior testimony to the contrary' (*g*). This doctrine, as to the effect of the declaration of the parents, has,

(*a*) *Elizabeth Hamilton* v. *Laird of Calderwood*, 6 March 1564; Act and Decree of Commissaries' Court; Riddell, Peer. and Cons. Law, p. 552.

(*b*) *M'Lean*, H. L., March 1851, 1 Macq. 278, n.; *Heathcote*, H. L., March 1851, 1 Macq. 277.

(*c*) *Hamilton* v. *Calderwood*, *supra*; *Eager* v. *Grimwood*, 16 L. J. Exch. p. 236; *Ritchie* v. *Cuninghame*, Nov. 1857, 20 D. 35, where the only connection proved was two hundred and twenty-six days prior to the birth, and there was every reason to believe that that was the only occasion of intercourse.

(*d*) Case of the Gardner peerage, *supra*, p. 13; *Innes* v. *Innes*, *supra*; *Jobson* v. *Reid*, 26 May 1827, 5 S. 715, and 9 Jan. 1830, 8 S. 343, and 31 May 1832, 10 S. 594, in all of which cases there was unusual gestation. On account of suspicious circumstances, the legitimacy in the two first was denied, although such circumstances, *per se*, would not have been sufficient to bastardize the issue. A decision almost tantamount to this was given in the case of *Reid*.

(*e*) Decretal iv. 17, 3, and ii. 19, 20. See D'Aguesseau iii. p. 184.

(*f*) Craig ii. 18, 20; Stair iii. 3, 42; Bankt. iii. 3, 98.

(*g*) Ersk. i. 6, 49. See this better stated in Ersk. Prin. i. 7, 36.

in modern cases, both in England (*a*) and in Scotland, been much shaken. It may often happen that noxious passions sway the declarations of the parents; and unless they be accompanied by other circumstances, such as the child being born shortly after marriage (*b*), the presumption of law in favour of the child's legitimacy would not be set aside. By the modern law of England, such evidence on the part of the parents seems to be quite incompetent, either as regards the direct proof, or any collateral fact tending to establish non-access: it has in various cases been rejected as altogether incompetent (*c*). It is always of importance to consider whether the declarations of the parents are corroborated by their whole conduct: if such declarations are not in conformity with the real evidence derived from their actings, they will be rejected (*d*); if, however, they tally with it, and give expression to the inference which would otherwise be drawn from their conduct, they will

(*a*) *Cope* v. *Cope*, 1833, 5 Carr. and P. 504; *Smyth* v. *Chamberlayne*, 1792, in Nicolas, p. 147; *S. P. Goodright* v. *Steven*, 1777, Cowp. 591; *Reg.* v. *Kea*, 1809, 11 East 132; *Atchley* v. *Sprigg*, 1864, 33 L. J. Chan. 345. Also *Legge* v. *Edmond*, 1856, 25 L. J. Chan. 125, where it was held that the declaration of a mother is not admissible to establish non-access on the part of the husband; but that if this fact be *aliunde* established, she may prove the paternity. In the same case, letters from her to the alleged father were not admitted to prove non-access by the husband.

(*b*) See *Leburn* v. *Brown*, 11 Dec. 1802, in Lothian, p. 239; *per* Lord Wyndford in *Innes* v. *Innes*, *supra*. On the general question his Lordship remarked: 'It is said there are declarations. Declarations, I agree with the learned counsel at the bar, are entitled to very little credit.'

(*c*) *Wright* v. *Holdgate*, 1850, 3 C. and K. 158; *Anon.* 1856, 25 L. J. Chan. 136, note, 23 Beav. 273; *Legge* v. *Edmond*, 1856, 25 L. J. Chan. 125; *Rex* v. *Sourton*, 1836, 5 Ad. and E. 180.

(*d*) *Walker* v. *Walker*, 23 Jan. 1857, 19 D. 290; *Beattie* v. *Baird*, 15 Jan. 1863, 1 Macph. 273. In *Walker's* case, the question was as to the legitimacy of a son born before the marriage of his parents. He was brought up and treated as the eldest child of the family, and bore the husband's name. He was held out to the world, and generally understood and believed by all the friends and acquaintances of the family and by persons dealing with the deceased, to be his eldest son; and he continued to be so recognised down to his father's death; and for thirteen years after it, having, as his heir, entered into possession of a farm under an unexpired lease, which he subsequently, as heir of his father, renounced. It was only when some family disputes arose as to money matters, that the mother for the first time declared that he was not the son of the deceased, but of another man. She was then not only old, but also feeble, of deteriorated habits as to sobriety, and was at the time she made them living under the influence of a younger son. The Court refused to give any weight to her declarations.

have full weight given to them. Of this last a very strong illustration is found in the case of *Mackay* (*a*), already referred to. The Lord Ordinary (Curriehill), in his note, said: 'The evidence consists chiefly of the repeated and unequivocal declarations as to the claimant's illegitimacy, made both by her mother herself, and by Mackay, her mother's husband, in such peculiar circumstances as do not admit of suspicion as to the truth of their statements. The canon law appears to have admitted the concurring testimonies of the husband and wife as evidence to overcome the legal presumption, *pater est*, etc. And this also appears to have been always acknowledged as the law of Scotland. Of course such declarations will not have that effect, if they be made in such circumstances as to affect their credibility. But when the declarations are unambiguous, and are corroborated by the conduct of the parties, and there is no reasonable ground to suspect their truth, such evidence appears to be justly entitled to full effect, because it is in the highest degree improbable that parents will conspire—and that, too, without there being any rational motive for such unnatural conduct—to bastardize their legitimate issue, and because they are the parties who necessarily have the best *causa scientiæ* of the illegitimacy.' In the Inner House, the Lord President (M'Neill) observed: 'Having here the evidence of both parents in regard to its illegitimacy, having here particularly the statement of the circumstances under which it was born, and the concealment of its birth from the husband for some time; having also the reasons assigned for its being illegitimate corroborated by other extrinsic circumstances not to be impeached of partiality one way or other, we have the strongest case that can be imagined for establishing the illegitimacy of the child, unless we have other statements that will counteract the presumption.' And again: 'While we have no evidence of the recognition of the legitimacy of the claimant, we have evidence given, at an early period of her history, presumptive of her illegitimacy. We have the repute of the place where the child was born, and the statement of its illegitimacy by the mother under circumstances which entitle it to credit; the subsequent denials of its legitimacy at a more advanced period by its mother;

(*a*) *Webster* or *Mackay* v. *Mackay*, 24 Feb. 1855, 17 D. 494.

the statement of the husband to the same effect; the circumstances condescended on by the wife, that it was impossible for the husband to believe that he was the father; the statement of both corroborated by the army references—and this account, with nothing to counteract it but the treatment by Mackay of the mother and child, which resolves itself into individual peculiarity; and the statements of certain witnesses which, from their own nature, are open to suspicion. Therefore, I think, there is no reason for sustaining the claimant's legitimacy.' Lord Deas said: 'If I had the slightest doubt of the truth of the statements attributed to the husband and wife, if I found anything startling or incredible, or mysterious, or unexplained in the evidence, I should reject the whole of it, so far as adverse to the pursuer, and give effect to the legal presumption of legitimacy. But upon a careful consideration of the evidence, I find nothing of the kind. On the contrary, the whole other facts and circumstances are just such as would naturally lead us to expect the truth to be—what the husband and wife stated and admitted it to be—that the pursuer was not the child of the husband.' Such declarations, therefore, will not be held conclusive for one side or the other (*a*). It is, however, one of the strongest circumstances against the legitimacy, that the mother concealed the birth from the father, and that he never knew of the existence of the child (*b*).

Personal resemblance.

In questions of legitimacy, it has sometimes been contended, that personal resemblance of the child to the alleged father forms an important circumstance in favour of the legitimacy. This was one of the points in *Day* v. *Day*, where the presiding Judge (Justice Heath) observed: 'I do admit these resemblances are frequently fanciful, and therefore you should be well convinced it does exist; but if you are convinced it does exist, it is impossible

(*a*) This subject was much discussed in the *Douglas* case, and what is stated in the text is all that was claimed for the parental acknowledgment.—Defender's Memorial, p. 38. See, however, the opinion of Lord Chancellor Cottenham in *Morris* v. *Davis*, 5 Clark and Fin. 242, who attributes much weight to the declarations of the parents.

(*b*) See Edinr. Review, vol. xlix.; English Law Magazine, vol. iv. pp. 41–2; Nicolas, Adul. Bast. pp. 288–9. And see the dicta in the cases of the Banbury peerage, and *Morris* v. *Davis*, *supra*, where this circumstance occurred. The Code Civil gives great weight to it—Art. 313. Toullier, vol. ii. p. 125. See *Webster* or *Mackay*, *supra*, p. 17.

to have stronger evidence' (*a*). In the case for the appellant, in the *Douglas* cause, it was observed, that 'it certainly forms a presumption in the belief of mankind, founded upon common observation, both ancient and modern' (*b*); and Lord Mansfield, in pronouncing judgment, expressed in the most decided terms his opinion in favour of the high importance of this kind of evidence (*c*). In the Townsend peerage case, before the House of Lords, this argument of family likeness was used and admitted by their Lordships (*d*). But in Scotland it has been held not a relevant averment to go to proof, as being too much a matter of fancy and loose opinion (*e*), unless the averment be of a particular and precise nature, as that the child was a mulatto, and consequently resembling or not resembling the alleged father (*f*).

Possession of status of legitimacy.

The possession of the status of legitimacy throws the onus probandi upon the party challenging it; and a person is said to possess it when he is held and reputed to be the child of the husband and the wife (*g*). In the case of *Hamilton* v. *Hamilton* (*h*), Lord Gillies observed: 'This is a declarator of illegitimacy brought by the pursuer at the distance of twelve or fourteen years after the

(*a*) *Day* v. *Day*, 1797, Sep. Rep. and Nicolas, p. 140. See also D'Aguesseau ii. p. 47, where the want of this resemblance to the family is used as an argument against a claimant: 'Si elle avait une ressemblance parfaite avec ceux de la famille dans laquelle elle veut entrer, ou quelques unes de ces marques exterieures qui ont souvent servi d'argument dans des causes pareilles.'

(*b*) Case of the appellant, p. 56.

(*c*) Paris and Fonblanque Med. Juris. vol. i. p. 220; Nicolas, p. 140.

(*d*) May 1843. Taylor, Man. Med. Jur. p. 642, 6th ed.

(*e*) *Routledge* v. *Carruthers*, 20 Jan. 1810, F. C.

(*f*) See the clear case of *Sinclair* v. *M'Arthur*, 12 Nov. 1812, not reported, Hume Sess. Papers, Winter 1812–13, vol. i. No. 5, where a white man, who admitted that he had sexual intercourse with a white woman, was held not to be the father of the child, because it was a mulatto.

(*g*) Balf. p. 240; Craig ii. 18, 20; Stair iii. 3, 42 *ad fin.*; Bankt. iii. 3, 101, and i. 5, 62; Spott. Pract. p. 28; Lothian, Cons. Law, p. 245; Nicolas, p. 139. 'I think,' said Lord Eldon in the case of *Roxburgh* v. *Ker*, 1822, 6 Pat. 830, 'that the presumption is to be made in favour of legitimacy, especially of a person who existed 200 or 300 years ago, if, upon looking through the transactions of the family descended from him, and the family connected with him, there has been no cogent evidence to show that one branch of the family did not consider another branch of the family as springing from an illegitimate source; but instead of doing so, took one another as individuals coming from a pure source.'

(*h*) *Hamilton* v. *Hamilton*, 22 Nov. 1839, 2 D. 89.

death of his brother, during which time the defender's mother has been considered as his widow, her status and rights as such recognised and sanctioned, and in consequence she is receiving the pension due to her in that character. During all that time also, the defenders have been considered as the legitimate and lawful children of their father; and to disturb that status, which is the purpose of the present action, is an object which the law must look upon with far from a favourable eye. The pursuer undertakes the onus probandi in circumstances of peculiar difficulty, created not only by the fact of the mother and children having been in the status respectively of widow and lawful children for so many years, but also from his undue, improper, and unexplained delay.' The possession of the status of legitimacy was a circumstance strongly founded on in the case of *Walker*, and one to which much weight was given by the Court in its judgment (*a*). As a consequence of this doctrine, 'the law of all well-governed countries is inimical to suffer the status of persons to be brought into question after their death' (*b*); and so far is this carried, that the older authorities lay it down, that if one was universally holden and reputed legitimate while in life, no one shall be allowed to prove him a bastard after his death (*c*). The modern practice, however, recognises the right of any party having interest, to challenge the legitimacy of any one deceased; and there are several older cases in which this right was recognised (*d*). If a person possessed the status of legitimacy during his life, or if he were served lawful heir by an inquest, the challenger must of course overcome the presumption thence arising by evidence; but his right to do so is clear (*e*). The word 'naturalis' applied by itself in a

(*a*) *Walker* v. *Walker*, *supra*, p. 16.

(*b*) *Per* Lord Meadowbank, senior, in Bell, Rep. Putative Marriage, p. 220; and see dictum of Lord Gillies in *Hamilton* v. *Hamilton*, 22 Nov. 1839.

(*c*) Stair iii. 3, 42; Spott. Pract. p. 28; Bankt. iii. 3, 101; *Roy* v. *Roy*, M. 12635, 1615; *Chirnside* v. *Williamson*, M. 12635, 1611; *Herpet* v. *Scott*, M. 2197, 1618; *Crawford* v. *Purcel*, M. 12636, 1642; *Somerville* v. *Halcro*, M. 12635, 1626; *Corsbie* v. *Shaw*, 1629, M. 2747; *King's Advocate* v. *Craw*, M. 2748, 1669; *Livingston* v. *Burns*, M. 11973, 1670; *Somerville* v. *Stains*, M. 12638, 1680; *Cunningham* v. *Montgomery*, M. 12637, 1670; *Forbes* v. *Yeaman*, 4 Sup. 342, 1696.

(*d*) See *Rutherford of Edzertoun* v. *Stewart of Tracquair* (1556), Riddell, Peer. and Cons. Law, pp. 132 and 455; *Sinclair Peerage Case*, 1768, Riddell, pp. 611 *seq.*; *E. Roxburgh* v. *General Ker*, H. L., May 1822, 1 Shaw App. 157, and 6 Paton App. 820.

(*e*) *Gifford* v. *Gifford*, 17 Feb. 1837, 15 S. 592; and authorities cited in the opinion of Lord Medwyn.

charter conclusively fixes bastardy. It was so held in the claim to the earldom of Caithness (*a*), where four individuals, David, Henry, John, and George Sinclairs, sons of John, Lord Berriedale, the eldest son of George, fourth Earl of Caithness, and all nearer than the branch through which the then claimant, Sir James Sinclair, claimed, were held to be out of the legal line in virtue of charters dated in 1587, 1606, 1618, and 1619, where they were described as 'son natural,' or 'brother natural.' This seems to have been decided the other way in the earlier case of *Borthwick* (*b*); but the judgment was hasty and precipitate, and having been reconsidered in 1808 was overruled (*c*); and in another claim to the same peerage the word was held to fix bastardy on the person to whom it was applied. The epithet 'carnalis' has not the same legal import. This is settled by the *Roxburgh* case (*d*), already referred to, where it was held to be a doubtful word, open to interpretation by the context of the deed where it occurred, by other family instruments, or other available evidence, such as family repute, throwing light on the sense in which it was used.

Whether child begotten of the marriage of adulterers be legitimate.

The Act 1600, c. 20, declares that marriages between a spouse divorced for adultery, and the person with whom the adultery was committed, are 'null and unlawful in themselves, and the succession to be gottin be sik unlawfull conjunctions to be unhabile to succeid to their said parents.' With regard to the issue, there is here no express declaration of their illegitimacy; and Stair was of opinion, that though they could not succeed as heirs, yet they were not bastards (*e*). But this opinion has been condemned by later writers (*f*). Erskine, although he refers to the subject three different times, does not state what his opinion was (*g*). The question here raised is discussed elsewhere, and the authorities upon the point

(*a*) 14 April 1791, Riddell, p. 583. See as to the old meaning of 'naturalis,' *ibid.* p. 581, note.

(*b*) 1762, Riddell, pp. 579 *seq.*

(*c*) *Ibid.* pp. 584 *seq.*

(*d*) *E. Roxburgh* v. *General Ker*, 1820, 6 Paton App. 820. In particular, the Lord Chancellor's (Lord Eldon's) speech, p. 830.

(*e*) Stair iii. 3, 42. Of course this opinion of Lord Stair's refers to children begotten after the divorce. It did not require a statute to say whether children born of the adulterous connection, at such a time that they must have been conceived *stante priore matrimonio*, were legitimate or not.

(*f*) Rid. Peer. and Cons. Law, p. 407, and see the authorities there cited; Notes to M'Ken. by Bayne, p. 168.

(*g*) Erak. i. 6, 51, and iii. 10, 6, and iii. 10, 9.

are there stated (*a*). Another question of considerable importance has given rise to much controversy, viz. whether, by the common law of Scotland (which was not abolished by the Act 1600), persons who have committed adultery can lawfully marry, and have legitimate issue, where the first marriage of the adulterer or adulteress has been dissolved by death, and not by divorce. Where the dissolution takes place through the medium of divorce, the statute in that case applies, and declares the marriage unlawful. Where the dissolution is through the medium of death, the common law alone applies. As this question is also discussed elsewhere, it is only necessary here to refer to that exposition of the law (*b*).

Legitimacy from a putative marriage.

II. A putative marriage is one where the parties, or either of them, *bona fide* believing that they could marry, had entered into the contract, while there was an unknown impediment, arising from relationship, previous marriage, or other irritant nullity, which prevented a valid marriage (*c*). A marriage of this kind is null; but it has often been decided by the courts of law in Scotland, that the children are legitimate, on account of the *bona fides* of both or either of the parents. This is an exception to the general rule that legitimacy is derivable only from a lawful marriage. In the case of a putative marriage, the law does not condemn the connection in the same way as it does fornication; and where no offence against the laws is intended by one or both of the parties, it would be inexpedient and cruel to extend the punishment of bastardy to the issue. It is a contract entered into in *bona fide;* and the law therefore holds that, as far as it can, it will attribute to it all the effects of a valid marriage. It will annul the contract itself, because it cannot sanction bigamy or incest; but it will uphold the legitimacy of the issue, because a contrary judgment would, in effect, impose a punishment without a crime, and entail rigorous hardship on individuals, which it is good policy, if possible, to avoid (*d*).

In a case which occurred in 1811, it was assumed on the bench and at the bar, that no decision had ever been pronounced on this

(*a*) Fraser on the Law of Husband and Wife, 2d edit.

(*b*) Fraser on the Law of Husband and Wife, 2d edit.

(*c*) Boehmer iv. 17, 34: Matrimonium putativum est quod solenniter et bona fide, saltem opinione justa unius conjugis contractum inter personas jungi vetitas consistit. *Hertius de mat. putat.* This is a special treatise on putative marriage.

(*d*) The law of England does not

subject by the Scotch courts; and it was said even, that 'it is a case which will not happen once in five hundred years' (*a*). There is scarcely a question in the law of legitimacy that has occurred more frequently, or upon which more direct and explicit decisions have been given. The doctrine was first introduced into the canon law by a rescript of Pope Innocent the Third (*b*). It was adopted at an early period in Scotland; and in the Consistorial Courts before the Reformation was sanctioned by many decisions. In the pre-Reformation times, the numerous impediments to marriage, arising from the absurd extension of the degrees of relationship in consanguinity and affinity, and more especially the affinity arising from illicit intercourse, gave rise to frequent cases where, after a family had been born, the marriage was declared to have been *ab initio* null, on account of the emergence of some impediment unknown at the time of its solemnization (*c*). The only resource of the courts was to support the legitimacy of the children, or bastardize whole masses of the population; and as the former alternative was what was dictated by an overruling expediency, the rule in favour of legitimacy was universally adopted in the Scotch courts. Within the space of a few years there occur no less than seventeen cases to this effect, in the single court of the Official of St Andrews, within Lothian (*d*); and there can be no doubt that in the courts of the other officials (whose records are now lost) the same law was administered. In the action of bastardy by *Rutherford* of Edzertoun against *Stewart* of Tracquair, in 1556, one of

admit of legitimation by a putative marriage. In one case, however,—that of *Sir Ralph Sadleir*,—the Legislature gave a remedy, by passing a bill to declare Sir Ralph's children legitimate. He had married the mother in the *bona fide* belief that she was a widow, it turning out afterwards that her husband was not dead. See Nicolas, Adult. Bast. pp. 61–63. It is there said to be the only case of the kind. By comity, however, the English law recognised the issue of such a marriage, thus legitimate in Scotland, to be legitimate in England, in the case of Margaret, Dowager Queen of James IV., quoted *infra*, p. 24. See Riddell, Peer. and Cons. Law, p. 421.

(*a*) Bell's Rep. Putative Marriage, p. 155.

(*b*) See it quoted in Bell, Rep. Put. Mar. p. 68.

(*c*) See Fraser, Pers. and Dom. Rel. vol. i. p. 67. There are instances of marriages being declared null, even owing to affinity by the spiritual relationship of godfather and godson subsisting between one of the parties and the father of the other.

(*d*) *Quhite* v. *Ewanstod*, 10 March 1541, Lib. Off. Sent. St And. No. 116; *Moubray* v. *Smyth*, 19 Feb. 1542, *ibid.*

the grounds of action was, that his grandfather and grandmother were related within the forbidden degrees of consanguinity, and that this *impedimentum consanguinitatis* was *iis contrahentibus notum.* The doctrine may be further illustrated by the important case of Margaret, Dowager Queen of James IV. (*a*). After the death of James IV., she married Archibald Douglas, Earl of Angus; but this marriage being in 1525 adjudged, on account of the Earl's pre-contract with another lady, to have been from the beginning null and void, she was divorced *simpliciter;* and on account of the Queen's ignorance of the pre-contract, and consequent *bona fides* in the marriage, in order that her offspring *propter parentis, saltem Reginæ ignorantiam nihil damni inde pateretur,* the decree specially declared the legitimacy of Lady Margaret Douglas, the sole issue of the marriage. An earlier and very striking illustration is found in the case of *The Earl of Rothes,* in 1459 (*b*). The Earl having, after his marriage with Countess Christian had subsisted for many years, instituted a divorce on the ground of relationship within the forbidden degrees, it became necessary to consult the interests of the issue. A submission was accordingly entered into between him and William, Earl of Orkney and Caithness, the father-in-law of the eldest son of the marriage; and the arbiters having determined that it was expedient that the divorce should proceed, they ordained (1) that letters should be executed, at the Earl of Rothes' expense, against all and sundry having any knowledge of or concealing the apostolic *dispensation, if any was* had or obtained, for the marriage betwixt the said Earl

No. 117; *Somerville* v. *Seytoune*, 29 July 1544, *ibid.* No. 121; *Brown*, 18 June 1547, *ibid.* No. 126; *Betoun* v. *Preston*, 16 Nov. 1543, *ibid.* No. 133; *Kinlocht* v. *Powre*, 15 Dec. 1543, *ibid.* No. 135; *Bisset* v. *Lychtone*, same date, *ibid.* No. 136; *Charterhouse* v. *Stewart*, same date, No. 138; *Dunning* v. *Moncrieff*, 13 April 1545, *ibid.* No. 142; *Barclay* v. *Stewart*, 10 Feb. 1546, *ibid.* No. 147; *Calwart* v. *Gray*, 18 June 1548, *ibid.* No. 151; *Galloway* v. *Cok*, 5 Sept. 1548, No. 153; *Cokrane* v. *Charteris*, 2 May 1549, No. 159; *Barclay* v. *Lindsay*, 21 June 1550, No. 161; and *Moncrief* v. *Dundas*, 30 Aug. 1550, No. 163. The reports of these cases are printed in a volume forming part of the contributions to the Abbotsford Club.

(*a*) See it stated in Burnet's History of his own Times, B. i. c. 19; and in Lesley, de Reb. Scot. p. 419; Bell's Report of Put. Marr. p. 219; and Riddell, Peer. and Cons. Law, pp. 420 *seq.* and 469 *seq.*

(*b*) May 16, 1459. See Riddell, Peer. and Cons. Law, pp. 453 *seq.*, where the original documents are fully referred to.

and his lady; and (2) *for taking off* the exception of *illegitimacy* against the children, that the Earl should declare in judgment upon *oath* before the Official of St Andrews, that he *knew of late*, within the year last bypast, and had certain knowledge of the impediment of consanguinity set forth in *his* libel—*but that formerly he was altogether ignorant thereof*—viz. for the space of thirteen years after the birth of Sir Andrew Leslie, the *last* of his children then alive, procreat betwixt the said Earl and his wife.

The same doctrine was applied and enforced in the Court of the Commissaries after the Reformation. It was recognised by them in an early case, the pleadings in which occupy many pages of the Commissary Record (*a*). This was an action of bastardy at the instance of Alison Dunbar, with consent of her husband, against Christian Adair, alleging herself lawful daughter of William Adair by the deceased Janet Dunbar, sister of Alison. The grounds of the action were, that both before and during the intercourse and cohabitation between William Adair and Janet she was knowingly and legally married to another—William Mundale of Portounsake—Christian being, as a necessary consequence, an adulterine bastard. This conclusion was maintained, 'but always and under the exception, in caice neither of ye saidis personis had been ignorant of ye said impediment standing;' it being set forth, 'the chief point of ye question stands gif ye saidis personis or ather of them was ignorant yerof, quhilk ignorance maun infer the said legitimation, or ellis the samin cannot be concludit.' In order to show how unavailable, in the circumstances of the case, this plea of ignorance would prove, the pursuer sets forth that Janet Dunbar, the defender's mother, 'can not be judged ignorant of ye foirsaid impediment, because the same is grounded upon her awin deid; and as to the said William Adair, he nor na persone descending from him may be hard to allege his ignorance, because he, the tyme of ye last allegit marriage, perfatlie knew the said former impediment, in sa far as ye said first impediment and wedding, wyt ye said mutuale intertenement, procreation of children, ande reputation of the saidis personis as mereit folkis was than, and be the space of twa or thrie yeiris preceding notourlie knawin divulgeit, and publiest in the

(*a*) *Dunbar* v. *Adair*, 20 May 1573, MSS. Rec. See Riddell, pp. 456 *seq.* and 476 *seq.*

haile parochin of Mochrum, by common voice and publick fame, in the quhilks the said umquhile Williame Mundale, Janet Dunbar, and Williame Adair, dwelt all that tyme; quhairfore in *re publica nota cujus etiam erat promulgata fama viciniæ*, the said William Adair can not be hard to pretend ignorance, becaus in yat he suld be hard to allege *latissimam culpam imo dolum et turpitudinem suam, quod est nescire illud quod omnes intelligunt.*' And then it is further argued, that the first marriage with William Mundale being matter of public notoriety, William Adair must be held to have known it: 'The said William, be the notorietie of the deid, is convict of knawledge, *presumptione juris, et de jure, contra quam non recipitur probatio*, albeit he had been ignorant yerof, as he was not; and trew it is, yet ye lawe makand barnis lauchfull, *propter ignorantiam impedimenti et bonam fidem*, is not extendit to fraudful, grose, and effectuat (*a*) ignorance, but is restrictit *ad probabiles ignorantias sicut duntaxat*, and yer can be na answer maid that ye said allegit ignorance was probable, *cum par sit scire ac scire debere.*' The case resulted successfully for the pursuer, Janet being declared illegitimate. The same doctrine was adhered to by another decision, which also underwent elaborate discussion (*b*). An opinion recognising the legitimacy was pronounced by the Court of Session in regard to the issue of the marriage of Campbell of Carrick, in 1747. The immediate question in that case related to the marriage of the pursuer, Jean Campbell, with Campbell of Carrick. She alleged a private marriage prior to the public marriage which he subsequently contracted with Magdalen Cochran; but she did not bring her action of declarator

(*a*) *Affected.*

(*b*) The impediment here was the previous and subsisting marriage of the woman. In this case, the Commissaries specially called upon the person challenging the legitimacy of the children, to prove that their father knew of their mother's prior marriage. 'Allowed the said John Hamilton' (the challenger) 'to prove any acts or qualifications that may infer the deceast Alexander Hamilton' (the father of the children, and the woman's second husband), 'his knowledge of the said Dorothea's marriage with Norries' (the first husband). A proof was led, and the children were declared bastards, solely on the ground that the prior marriage was 'known to the deceased Major Alexander Hamilton,' when he ran away with the woman and married her.—*Hamilton* v. *Burrell*, 7 Jan. 1702, MSS. Rec. Con. Decreets, vol. i. p. 448. Mr Lothian does not state the import of this case with his usual accuracy (pp. 241 and 3). The bastardy of the children was denied solely on the question of fact, and not on the ground of the law being against them.

till after his death, and there was issue of the second marriage. It had been decided at first in favour of the pursuer, but this was subsequently altered; and this last judgment was on appeal sustained. It is added, that 'such of the Lords as were for the interlocutor, declared that whatever was the issue of this question, the daughter would be legitimate from the mother's *bona fides*' (*a*). The point was again raised and argued in the year 1764, in regard to a prior marriage, but no decision appears to have been given (*b*). Finally, the point came before the Court in 1811 (in a case separately reported), when the judges were equally divided; and one of the parties having died, no decision was pronounced. There was not brought before the Court any one of the decisions now referred to; and it is very doubtful whether there would have been so great a division of opinion, had the prior judgments of the Consistorial judges, plainly and explicitly recognising the rule from the earliest times, been laid before the judges (*c*).

The opinions of the institutional writers are so far in accordance with the decisions, of the existence of which, buried as they were in manuscript, they do not appear to have known. Craig is quite express in favour of the legitimacy of the children, on account of the *bona fides* of one parent. Stair mentions Craig's opinion, without offering his own. Bankton is more decided in favour of Craig's view; and Erskine adopts Stair's example, of giving no opinion of his own, but of referring to that of Craig, without approving of or denying it (*d*). There is, however, a passage in Balfour on this subject, recognising the doctrine in the most express terms, and bearing the very highest authority, seeing that its author was the Official of St Andrews in Roman Catholic times, and the first Commissary after the Reformation, and subsequently Lord President of the Court of Session. This authority has been overlooked in preceding discussions on this subject (*e*). His words are:

(*a*) *Campbell* v. *Cochran*, 28 July 1747, M. 10456; Elch. Proof, No. 7, 5 Sup. 789; Cr. and Stu. Ap. 519; Ferg. Cons. Rep. 84; 3 W. S. 135, note.

(*b*) See *Donaldson* v. *Taylor*, 6 Jan. 1764. Arniston Sess. Pap. Adv. Lib. vol. lxxiii. No. 62, not reported.

(*c*) *Brymer* v. *Riddell*, 1811, contained in Bell's Report of Putative Marriage. See the remarks of Lord Jeffrey in *Kerr* v. *Martin*, 6 March 1840, 2 D. 778.

(*d*) Craig ii. 18, 18; Stair iii. 3, 42; Bankt. i. 5, 51; Ersk. i. 6, 51.

(*e*) Balf. p. 112.

'A woman sould have na dowrie gif scho be partit and divorcit fra hir husband for propinquitie and neirnes of blude on hir half and side; and nevertheless the bairnis gottin betwix thame befoir the divorcement are lauchfull, and may, be the lawis of this realme, succeid as airis to thair parentis; because the band of mariage, being lauchfullie proclamit, na lauchfull impediment wes objectit and fund, and the ane of the parteis, viz. the husband, knew na sic impediment the time of the mariage, and swa wes *in bona fide*.' But although, under these authorities, the issue of a putative marriage would be legitimate, yet such a marriage will not have the effect of legitimating issue born before it was entered into, the parents on the one hand not being at the time of the intercourse free to enter into a lawful marriage, and there being on the other no such *rei interventus* in the matter of *bona fides* as to give room for the plea of ignorance to legitimate the offspring (*a*).

Putative marriage must be public and regular.

In order to constitute a putative marriage, so as to save the legitimacy of the children, it would seem to be necessary that it be entered into publicly, and after due proclamation of banns (*b*). This doctrine is sanctioned by Pope Innocent III. himself (*c*), and by many of the commentators (*d*); and it is based on the principle that a regular marriage infers a presumption of *bona fides*, on account of the publicity of the transaction; while, on the other hand, parties who clandestinely marry do themselves afford the strongest proof that there could not be *bona fides* in their proceedings (*e*). In one

(*a*) Pothier, Tr. Cont. Mar. Part v. c. 2, s. 2; Merlin Rep. Univers. tit. Legit. sec. 2, § 2; Voet xxv. 7, 8; 1 Burge Com. 97; D'Aguesseau, vol. iv. p. 261; Sardis Tr. de nat. lib. Tractat. vol. viii. part ii. p. 137. Riddell, Peer. and Cons. Law, pp. 512 *seq.* See an argument to the contrary in 1 Duchesne 689, with authorities there referred to.

(*b*) Such was the second marriage in *Campbell* of Carrick's case, *supra*, p. 27. See the opinions of the judges in the case of *Lapsley* v. *Grierson*, *infra*, p. 29. Where the pursuer of a reduction of a confirmation as executor-dative, whose legitimacy was denied, merely set forth facts and circumstances inferring a marriage, but without averring any celebration, it was held that there was no presumption in favour of his legitimacy. *Swinton*, 20 March 1862, 24 D. 833.

(*c*) See Boehmer iv. 17, 36.

(*d*) Sanchez iii. 12, 1; Boehmer iv. 17, 36. A writer of authority thus states the law: 'The marriage always must be celebrated publicly in the appointed form, otherwise both have created suspicion in regard to their proceeding' (Walter, Lehrbuch des Kirchenrechts, sec. 327). Brower ii. 17, 12.

(*e*) *Dunbar* v. *Adair*, *supra*, p. 25, and stated in Ridd. Peer. and Cons. Law, p. 476. See also sentence of

case, the plea of *bona fides* was met by the answer, that 'she (the second wife) was married, if she was ever married, *without proclamation of banns*, which certainly takes from her all excuse of ignorance' (*a*). In cases where there was no ignorance, the marriage was annulled, and the parties prohibited from marrying again (Lib. Off. v. 12, 94, 103).

What is held a justifiable ignorance.

What shall be held to be a justifiable error or ignorance, must be determined according to the peculiarities of each case. It must be an *error facti*, as opposed to an *error juris* (*b*). It would be a justifiable error, if a party, on the faith of a decree of divorce in his favour, should marry another woman, and have children by her, although thereafter the decree be reduced, and the first marriage declared still to be subsisting. The children of the second marriage would be legitimate (*c*). In one case this point was fully discussed, and the nature of the error that must exist for the application of the rule is clearly brought out in the pleadings (*d*). It is not justifiable ignorance if knowledge could have been easily procured. It must be ignorance induced, as the Roman law has it, *errore acerrimo non affectato, insimulatove* (*e*). The French courts have determined that there is no necessity to prove *bona fides* when the cause of nullity is a prior marriage; it is in that case presumed, and it is for the challenger to establish bad faith, in order to bastardize the issue (*f*). The ignorance of the existence of the impediment must continue at the conception of each child, otherwise all born after knowledge of it has been obtained are illegitimate (*g*).

nullity of the marriage of the Duke of Albany in Thomson's Acts, vol. ii. p. 388. This formed one of the grounds of discussion in the case of *Brymer* v. *Riddell*, where the alleged putative marriage was clandestine.—Bell's Rep.

(*a*) *Irving* v. *Ker and Others*, 6 Aug. 1693, MSS. Cons. Decreets, vol. i.

(*b*) Boehmer iv. 17, 34; Hertius, de Matrim. Putat. s. 17.

(*c*) Boehmer iv. 17, 35.

(*d*) See *Dunbar* v. *Adair*, *supra*, p. 25; *Lapsley* v. *Grierson*, 19 Nov. 1845, 8 D. 34, aff. April 1848, 1 Clark and Fin. (N. S.) 498, where it was clearly laid down that a marriage, in its inception unlawful, being at a time when the woman's first husband must have been alive, could not legitimate the children born even after the time when it was presumed that the first husband had died, the mere continuance of the cohabitation after that event being insufficient without celebration to change the character of the connection. See, on this point, *Cunningham* v. *Cunningham*, 20 July 1814, 2 Dow 482.

(*e*) Code 5, 5, 4.

(*f*) 1 Duchesne 669.

(*g*) Boehmer iv. 17, 38. See Ridd. p. 455; Toullier, Droit Civil. i. No.

Legitimacy arising from *bona fides* alone, without any putative marriage.

III. There are cases where children are produced, not from marriage, or in *figura matrimonii*, but in such a manner as to render the mode of their procreation not so heinous an offence against the law as ordinary bastardy, and where, according to some authorities (of no great weight), legitimacy is obtained. 1. It is the opinion of some lawyers, that children born of a woman from a rape perpetrated on her, are legitimate (*a*). 2. Another case illustrating the doctrine, that the law, looking to the *bona fides* of the parents, will give legitimacy, although no marriage, real or putative, existed at the time of conception, or could ever, at common law, subsist during the entire lives of the parents, is said to be found in the question as to the legitimacy of the royal family of Stuart, and which, some think, carries the *favor prolis* so far, that if parties, in incestuous *concubinage*, procreate children, *bona fide* believing that no impediment existed to their subsequent marriage, and consequent legitimation of their issue, the latter will be legitimate from that *bona fides* alone. In this case, the children were born in incestuous concubinage; then the parents acquired a knowledge of the impediment; they obtained a dispensation to marry from the Pope, and actually married. Here there could be no legitimation *per subsequens matrimonium*, because no incestuous bastards can be legitimated, and it is alleged that the papal dispensation does not alter this doctrine (*b*); and therefore the only ground on which the legitimacy can be asserted, is said to be the *bona fides* of the parents, who, procreating children in concubinage, believed they could afterwards legitimate them (*c*). Of the opinion entertained at the time as to the legitimacy, evidence is furnished by the papal dispensation, which contains a clause legitimating the children; and by the circumstance that although the eldest son of the marriage succeeded his father as Robert III., he did so not as heir of the marriage or

600; Brower ii. 17, 12. But see *contra*, 1 Duchesne 673; see also *David Schaw* v. *Agnes Dawson*, 21 Jan. 1535, Off. Reg. of St Andrews, No. 87, where the children were declared bastard and illegitimate.

(*a*) See all the authorities *pro et con.* cited in Gluck Opuscula, vol. iv. p. 126.

(*b*) Sardis viii. 2, 137. But see *contra* on this point, Boehmer iv. 17, 16.

(*c*) Ridd. Remarks on Scotch Peerage Law, p. 184; *ibid.* on Peer. and Cons. Law, p. 515; *ibid.* Tracts, p. 181; *ibid.* Stewartiana, p. 1, where all the authorities on this celebrated case will be found, together with a reference to the numerous writers who have discussed it.

at common law, but by virtue of the Act of Parliament in 1373 regulating the succession (*a*).

(*a*) The case of *Fleming*, *infra*, p. 33, is identical with that mentioned in the text. The charter contained in the appendix to Erskine proves that Lord Fleming and the lady were related within the forbidden degrees, and that to a lawful marriage between them it was necessary that there should be a papal dispensation. The charter, moreover, contemplates the case of there being issue procreated before the arrival of the papal dispensation, and provides that in that event the children so procreated shall be legitimated *per rescriptum Principis*, the Crown's right to the escheat of bastardy being specially renounced. Had the subsequent marriage in virtue of the papal dispensation legitimated the children, there would have been no relevancy in these clauses of the charter.

CHAPTER II.

LEGITIMATION.

CHILDREN born bastards, may acquire the status of legitimacy in two different modes: 1*st*, By the subsequent marriage of their parents; and 2*d*, by letters of legitimation from the Crown.

Legitimation *per subsequens matrimonium.*

(1.) The law of legitimation *per subsequens matrimonium* was introduced into Scotland within the range of authentic history. Its origin is to be found in the Roman law. In that system, however, it was only gradually admitted, as it was a great innovation on the older law of Rome. The object of its imperial authors—an object which it accomplished—was to put down that system of concubinage which had grown into almost universal favour throughout the empire, and which the law regarded as a semi-marriage (*a*). It is generally supposed that it was at the instigation of the clergy that Constantine, the first Christian emperor, promulgated the law of legitimation *per subsequens matrimonium;* by which the sinful connection of concubinage could be changed into a lawful marriage, with all the effects which marriage operates. The constitution of Constantine was temporary, and is now lost. It was renewed by Zeno (*b*); confirmed by Anastasius and Justin (*c*); and finally converted into a perpetual law by Justinian (*d*). The law appears to have been late in being introduced into the ecclesiastical legislation of the West. There is no recognition of it in the Decretum of Gratian; and its first appearance in the canon law is found in two rescripts of Pope Alexander III. preserved in the Decretals of

(*a*) Code v. 27, 3; Dig. xxv. 7; Ulp. in l. 13; Dig. ad Leg. Jul. de adult. Licita consuetudo semimatrimonium; Code vi. 57, 5; Taylor's Civil Law, p. 272; also Croke's Introd. to *Horner* v. *Liddiard*, p. 72; and Beza de Repud. et Divort. pp. 245 *seq.*

(*b*) Code v. 27, 5.

(*c*) Code v. 27, 6 and 7.

(*d*) Code v. 27, 9 and 11.

Gregory, and issued in 1180 and 1172 (*a*). These extended the benefits of subsequent marriage to the offspring of casual love, and not merely to the issue of the systematic fornication known under the name of concubinage. The law of England does not sanction legitimation. Such was the common law of England, which the English barons refused by the famous statute of Merton to change, though the rule of the canon law was eagerly pressed upon them by the clergy. *Nolumus leges Angliæ mutari* (*b*).

Legitimation by the law of Scotland.

It is stated in the Regiam Majestatem, that the law of this country did not admit legitimation *per subsequens matrimonium* (*c*). This is generally abandoned, as an unauthorized transcription from Glanvil, of the law of England; and it is maintained that the law of legitimation prevailed in Scotland even in the early age to which the Regiam is said to apply. But this, again, is mere conjecture. No instance has been discovered of the existence of the law contemporary with that ancient treatise; and some hold it to have laid down the law correctly, as being in accordance with the strict feudal institutions of the time (*d*). Erskine has given, in an Appendix to his Institute, a 'Charter by James IV. to Lady Margaret Stewart, by which, as well as by the charter mentioned in Mr Hay's Vindication of Elizabeth More, it appears that legitimation *per subsequens matrimonium* was rejected by the ancient law of Scotland' (*e*). This is an unfortunate illustration. The charter is granted in contemplation of the marriage of the lady with Lord Fleming. The document itself bears, that the parties stood towards each other within the prohibited degrees, and declares, that if any children should be born of their connection before the arrival of a dispensation from Rome, such children shall be held legitimate *per rescriptum principis;* and the argument of Erskine appears to be, that legitimation was not in use in this country, seeing that the marriage itself did not legitimate such issue; thus overlooking the established rule, that subsequent marriage never legitimated children born of an incestuous connection (*f*). Legitimation *per subsequens matri-*

(*a*) Decr. iv. 17, 1; iv. 17, 6. Tanta est enim vis sacramenti (matrimonii) ut qui antea sunt geniti post contractum matrimonium habeantur legitimi.

(*b*) Blackstone, Book i. c. 16.

(*c*) Reg. Maj. lib. ii. c. 50, 51.

(*d*) Ersk. i. 6, 52; Irvine on Mar. 77.

(*e*) Ersk. Inst. App. No. 2.

(*f*) Ridd. Tracts, p. 195; case for Agnes Kerr, in *Kerr* v. *Martin*, 6

monium does, however, appear to have been in existence in Scotland prior to the Reformation, and is generally supposed to have been borrowed from the canon law (*a*). The law thus established in Scotland, has remained in existence without material alteration till the present time (*b*).

Principle of the law.

The principle to which the law of legitimation *per subsequens matrimonium* is to be referred, has formed a subject of controversy. The canonist commentators based the law not on general views of expediency and justice, which appear to have been the groundwork of the legislation of the Roman emperors, but upon a fiction which they adopted in order to reconcile the new law with established rules. Assuming it to be a general rule, that children are not legitimate unless born in lawful wedlock, they declared the principle to be, that the parents were *fictione juris* married at the birth of the child; and by this fiction they avoided the necessity for violating a general rule. The point was elaborately discussed in a late case; and the decision of the Court rejected the fiction, holding the law to be based solely on views of expediency (*c*). In a previous case (*d*), Lord Gillies had well observed: 'The legal fiction is not the foundation of the rule. The rule is founded on principles of justice or expediency; and the fiction is resorted to merely to explain and reconcile it to the principles or notions of the lawyers of the time.' 'The civil law forms in truth the law of Scotland upon this point; but in the civil law no mention is made of the fiction. This was only resorted to at a later period by the canonists, whose authority with us is of a secondary nature. This, then, is not the case of a fiction coeval with the rule of law, and on which, at its introduction, the rule was declared to rest. Here the law, as originally promulgated,

March 1840, 2 D. 752, p. 61 of case; Stewartiana, pp. 14, 15.

(*a*) Ridd. Peer. and Cons. Law, pp. 451, 478; case for Agnes Kerr, p. 55; dicta of Court in *Kerr* v. *Martin*, *supra;* Ridd. Tracts, p. 171; *Crawford* v. *Crawford*, 17 June 1564, MSS. Rec. Com. Court, vol. i.; *Hamilton* v. *Hamilton* in 1557, Riddell, p. 478, note; Birnie's History of the Family of Hamilton, edited by W. D. D. Turnbull, Esq., advocate; also Anderson's History of the House of Hamilton, p. 427.

(*b*) Craig ii. 13, 16; Spot. *v.* Bastardy; M'Ken. Works, vol. ii. p. 561; Bankt. i. 5, 54; Ersk. i. 6, 52; Dirl. and Stew. 191. See (in correction of the instance of legitimation *per subsequens matrimonium*, quoted by Craig ii. 13, 27) Riddell, Tracts, p. 155.

(*c*) *Kerr* v. *Martin*, 6 March 1840, 2 D. 752.

(*d*) *Per* Lord Gillies in *Rose* v. *Ross*, 1830, 4 W. and S. 80, 81. See also opinions of Lords Mackenzie and Medwyn, *ibid.*

stood on its own proper principles of justice and expediency; and the question is, whether this law is to be controlled by a fiction not countenanced by the civil law in which the rule originated, and which is in truth our law, but introduced at a later period by the canonists.' The foundation of this rule, which is alike agreeable to the feelings of mankind and highly conducive to the best interests of society, is the public expediency of enabling the parents of illegitimate children to remedy in some degree the injury inflicted on each other, on the children, and on society. Legitimation is thought to be recommended by these considerations of equity and justice, that it tends to encourage what is at first irregular and injurious to society, into the honourable relation of lawful matrimony; and that it prevents those unseemly disorders in families which are produced where the elder born children of the same parents are left under the stain of bastardy, and the younger enjoy the status of legitimacy (*a*). The legitimation of previous offspring is not a matter for which the father and mother could contract or stipulate, or which can be given or withheld according to what may be proved or inferred as to their purposes or understanding. It is, on the contrary, the gift or legal result of the law, as applicable to certain facts and circumstances; the value and effect of which must be judged of by the law alone, independent altogether of the intentions or expectations of the parties (*b*). It is the converse of the same doctrine to state, that 'children born illegitimate will be legitimated by the subsequent marriage of the parents, even against the will of the children' (*c*). If it appear that a man and a woman while yet free have had children born to them, and that subsequent to the birth of these children they have married, the law draws for the children the necessary inference—they are legitimate. On the other hand, nothing short of marriage will legitimate the children. 'Mr Fullarton's purpose plainly was to legitimate the children without marrying the mother. But this he could not do. To be good for anything, a marriage must be a present marriage, not dissoluble at the pleasure of a party, or even by consent of both' (*d*).

(*a*) *Munro* v. *Munro*, 15 Nov. 1837, revd. H. L. 10 Aug. 1840, 1 Rob. App. 492.

(*b*) Munro, *ibid.*

(*c*) Walter, Lehrbuch des Kirchenrechts, sec. 327.

(*d*) *Per* Lord Glenlee in *Anderson* v. *Fullarton*, 1795, Hume, p. 365.

What children are legitimated.

(2.) The Roman law confined the privilege of legitimation to the issue of an ingenua or free woman, when they were born in concubinage; and denied it to those of an ancilla, or the offspring of prostitution, or casual fornication. But both the canon law and the law of Scotland allow the legitimation of all bastards, provided they are not the offspring of an incestuous or adulterous connection (*a*); and the later canon law, which permitted adulterers to marry, allowed, as a consequence, even the legitimation of illegitimate adulterous issue previously begotten (*b*). In a late case, moreover, a large minority of the Court expressed great doubts as to whether adulterous or incestuous bastards could not now be legitimated by the subsequent marriage of their parents (*c*). Further, although the child be conceived in adultery, yet if born after the marriage is dissolved, when the woman had become a widow, or the man a widower, it would be capable of legitimation, because the time of birth will be relied upon if favourable for the child (*d*); but this is contrary to many authorities, who maintain that the time of conception and not of birth must be looked to (*e*). The former of these opinions may be supported by the analogy of the English law, which, rejecting altogether legitimation *per subsequens matrimonium*, regards as legitimate a child born a day after marriage; but the latter is more in accordance with the genius of the Scotch law, which tests the possibility of legitimation by the question, Could the parents at the time of conception have lawfully married? The test was so put by the majority of the judges in the case of

(*a*) Craig ii. 13, 16; Bankt. i. 5, 54; Ersk. i. 6, 52; Bell's Prin. 1627. *Irving* v. *Ker and Others*, 6 Aug. 1693, MSS. Con. Decreets, vol. i. p. 192, where the interlocutor was, 'Find that the defence of Elizabeth Ker's (second wife's) marriage after the death of Margaret Wishart (first wife) is not relevant to legitimate the children procreat betwixt the said defender (Elizabeth Ker) and the defunct during the lifetime of Margaret Wishart, the defunct's lawful wife.' *Burrell* v. *Hamilton*, *supra*, p. 26. The point was expressly pleaded and admitted in *Macalzeane* v. *Macalzeane*, 1582, MSS. Rec. Com. Court. Riddell, Peer. and Cons. Law, p. 461.

(*b*) Struvius, Introd. ad Prax. Jur. Can. p. 182; Boehmer iv. 17, 16 *seq.*

(*c*) *Kerr* v. *Martin*, *supra*. See also Boehmer iv. 17, 23.

(*d*) Code v. 27, 11; Covarruv. tom. i. Par. 2, s. 2, n. 2; Voet Pandect, lib. xxv. tit. 7, Nos. 7 and 8; dictum of Lord Chancellor in *Munro* v. *Munro*, 10 Aug. 1840, 1 Rob. 492; Ridd. Peer. and Cons. Law, p. 462.

(*e*) Bankt. i. 5, 54; Ersk. i. 6, 49 and 52; Pothier, Tr. de Mar. Par. 5, c. 2, No. 415; Merlin, t. vi. tit. Legitimation, sec. 2, and authorities there cited.

Kerr v. *Martin*, where it formed a question, whether, where either of the parents has entered into a marriage with a third party after the birth of the child, and prior to their own marriage, the child will notwithstanding be legitimated, or whether the intervening marriage operated as a mid-impediment. After elaborate argument, the legitimacy was sustained by the opinion of seven judges (*a*) against six (*b*), on the ground that such was the rule of the Roman and the canon laws, the opinion of nearly all the commentators on these systems, and that of almost all the Scotch authorities; that the only ground of doubt on the subject arose from the principle to which some jurists had referred the law of legitimation by subsequent marriage, viz. that at the time of the child's birth the parents were married, and consequently that there could be no such marriage when there was an intermediate marriage of either; but this fiction the majority held was neither the foundation of this mode of legitimation originally, nor was it ever recognised at any period as the true principle of the law. On general grounds, they held this to be clear; for if it was the purpose of the law of legitimation to restrain concubinage, encourage marriage, and strengthen the tie between parents and children, these considerations are entitled to the same weight, at whatever period parties previously connected with each other, desire to marry. There is neither authority nor reason for holding, that when an intermediate marriage of a parent with a third party is dissolved, the party should be prevented from so entering into a marriage with the other parent of these acknowledged children, as not only to terminate an illicit intercourse, but to give their family the benefit of that marriage which the law from the first invited them to celebrate. Moreover, there is no foundation in necessity or authority for the fiction superinduced by the canonists upon the law of Rome; and if this fiction existed, it would have the usual effect of all fictions, namely, to overrule the truth, and admit of no disproof or contradiction; and therefore its effect obviously should be, to annul the intermediate marriage,

(*a*) These were, Lords Jeffrey, Cuninghame, Cockburn, Murray, Mackenzie, Gillies, Fullerton.

(*b*) These were, Lord President Hope, Lord Justice-Clerk Boyle, Lords Moncreiff, Meadowbank, Glenlee, and Medwyn. Lord Glenlee had, however, resigned before the judgment was pronounced.

and not to raise it into an insuperable obstacle to its own adoption (*a*).

Nature of the subsequent marriage.

The old law of Scotland required that the marriage of the parents should be a public and solemn marriage, in order to effect legitimation of the issue. It was so in the cases of *Crawford* and *Hamilton* (*b*), already quoted, the earliest instances that have been traced of legitimation *per subsequens matrimonium*, the marriage in both instances being before Holy Kirk. The noted case of *M'Adam* (*c*) may be held to have completely altered this; the marriage which received effect there being merely an acknowledgment of the woman as his wife, and of the children as his, in presence of the domestics. It is settled law, that if a connection was at first illicit, it must continue to bear that character until a change is made. And this holds even where the connection was from the first in form of marriage, if there be reason to suppose that either of the parties was not entitled to assume that he or she was free to marry (*d*). As to the children who are legitimated, Erskine's doctrine is, that marriage after the birth of a child gives a status of legitimacy to children that are born before the marriage, 'who are allowed to have been procreated by the parties marrying.' The old ceremony of the 'cairclaith' illustrates this, the children having of old been all present and taken under the mother's cloak. But if a question arise as to any child alleged to have been procreated by the parties, proof will be allowed to expiscate the matter. This point arose in the case of *Innes*, already referred to. The Lord Chancellor observed: 'It is a question of proof, whether children born of a woman before marriage are the children of the man whom she afterwards marries. That proof may arise from the inference to be deduced from the parties having lived together, by which, of course, must be meant, exclusively living together; be-

(*a*) *Kerr* v. *Martin*, 6 March 1840, 2 D. 752.

(*b*) Note (*a*), p. 34, *supra*. Riddell, Tracts, p. 162.

(*c*) *Walker* v. *M'Adam*, 1807, M. App. Proof, No. 4, aff. 1 Dow 148.

(*d*) *Cunninghame* v. *Cunninghame*, 20 July 1814, 2 Dow 482; *Lapsley* v. *Grierson*, *supra*, p. 29. In this last case, the woman's first husband having left this country, she within a few years married again; and though there was reason to believe that the first husband had died a year or two after that, yet the children born after the time when he was understood to have died were held illegitimate, because there had been no change made in the connection, which was at first adulterous.

cause, if the woman had lived not only with the person whom she afterwards marries, but had lived promiscuously with other men, no inference could be drawn from the cohabitation. But if there be an exclusive cohabitation—if there be therefore a reasonable inference of fact arising either from positive proof or a deduction from the circumstance of their having lived exclusively together, that a child born previous to the marriage is the child of these two persons, then unquestionably, by the law of Scotland, that child will be legitimated by a subsequent marriage' (*a*).

Ceremony of the caircloth.

The legitimation could not take place, in the Roman law, without the consent of the children themselves, as it subjected them to the domestic despotism of the *patria potestas* (*b*). Perhaps it was from this cause that the curious ceremony of putting the children under the caircloth, or nuptial pallium, took its origin. They were placed during the marriage ceremony under their mother's cloak, from which, after it was finished, they emerged. This proceeding appears to have been in common use throughout Europe (*c*), and is still in use among the common people in this country. A curious instance of a somewhat analogous ceremony is mentioned in the register of the Official of St Andrews in 1564, where the father is said 'to have set his fete on owris, and laid his heid on ilk ane of our heidis, and said promeisit yat he suld take ye peril and charge on him' (*d*).

Effects of legitimation.

(3.) 1. The legitimacy or status which the subsequent marriage of a bastard's parents confers upon him, entitles him to all the rights of a lawful child. He will succeed as heir to his parents or other relations, as well in the direct as in the collateral line. He is entitled to legitim, and would take under a destination to lawful children (*e*). 2. But children thus legitimated will, in the case where there has been an intermediate marriage of either of their parents with another, be postponed, in so far as regards succession, to the children, if any, of such intermediate marriage (*f*). This

(*a*) *Innes* v. *Innes*, 20 Feb. 1837, 2 S. and M'L. 444.

(*b*) Novel 89, c. 11.

(*c*) Ridd. Tracts, pp. 164 *seq.*; Ridd. Peer. and Cons. Law, pp. 478 and 525; Turnbull's History of the Families of Burnie and Hamilton. See Fraser, Pers. and Dom. Rel. vol. i. p. 176; and argument in *Kerr* v. *Martin*, *supra*.

(*d*) *Thomas Baxter*, 1564, Reg. of the Official of St Andrews. Riddell, p. 482, note.

(*e*) Ersk. i. 6, 52; Bell's Prin. 1627; dicta in *Kerr* v. *Martin*, *ut supra*.

(*f*) Dirl. and Stew. 191; Craig ii. 18, 12; Bankt. vol. ii. pp. 278–9; Ersk. i. 6, 52; Bell's Prin. 1627; Hutch. Just. vol. ii. p. 255; Ridd. p. 522,

point was elaborately discussed in the case of *Kerr* v. *Martin*, which ruled that legitimation should in such a case take place notwithstanding the intermediate marriage; the judges who sustained the legitimation in that case expressly declaring, that the legitimation of the children should be without prejudice to the children of the intermediate marriage. It was not necessary, however, for the decision of the case. The following passage from the writings of Pothier very clearly states the rule. After observing that children thus legitimated will have all the advantages of seniority over those born after the subsequent marriage of the parents, he proceeds to explain why they ought not to have those advantages over the children of a prior or intervening marriage: 'L'effet de la légitimation est de donner à l'enfant, né d'une conjonction illicite avant le mariage, les mêmes droits, qu'il auroit eus, s'il fût né durant le mariage; or le mariage que son père a contracté avec sa mère, étant le second mariage de son père, il s'ensuit, qu'il ne peut être regardé, que comme un enfant de son second mariage: or il répugne, que l'enfant du second mariage soit l'aîné des enfants du premier. D'ailleurs, la loi, en donnant au mariage la vertu de purger les vices de la conjonction, qui l'a précédé, et de légitimer l'enfant qui en est né n'a pas entendu préjudicier aux droits de personne' (*a*). 3. But other children born in lawful wedlock, of the bastard's parents, and consequently after the bastard, are postponed to the legitimated child with regard to succession, and other civil rights depending on primogeniture, in the same manner as they would be had he been born in lawful marriage (*b*). 4. If a bastard should die, leaving lawful children, and thereafter his parents should marry, it would seem that even then the marriage would so operate as to enable the bastard's children to succeed, as if he himself had been legitimate at the moment of his birth (*c*). The minority of the consulted judges in *Kerr* v. *Martin* thought that the authors referred to 'have correctly stated' this point; but they base their opinion solely upon the fiction which that decision

contrary, however, to Mackenzie, vol. ii. p. 561.

(*a*) Pothier, Tr. des Successions, chap. i. § 1, art. 3, quest. 4, vol. xii. p. 349.

(*b*) Ersk. i. 6, 52; Bell's Prin. 1627.

(*c*) Novel 89, c. 8. *Per* Lord Fullerton in *Kerr* v. *Martin*, 6 March 1840; Bankt. i. 5, 58; More's Notes, p. xxxiii.; Bell's Prin. 1627; Pothier, Tr. Cont. Mar. Part v. c. 2, § 413; Voet. lib. xxv. tit. 7, § 7.

overthrew. It would certainly be a great hardship if the children of the eldest born son should be prevented from succeeding to the estates (and it may be honours) of his parents, through the accident of his having died before their subsequent marriage; while the second son, who happens to survive the marriage, takes the estate and honours. Pothier is clearly in favour of such legitimation, putting it on the ground of the legitimation being intended not only for the *antenati* themselves, but of all their descendants. The high authority of Baron Hume may be cited in favour of this view, as quoted by Lord Meadowbank: 'I observe it to be expressly laid down in the notes which I possess of the lectures of one of the highest authorities in the law of Scotland, Mr Baron Hume, that if a son born in concubinage shall himself marry, and shall die, leaving children, before the marriage of his parents; yet, if his parents do afterwards marry, his children will become entitled to all the rights of the lawful descendants of their grandfather, as if their own father had been born in wedlock. In that case, however, the son born before the marriage of his parents must have lived and died with the reputation of a bastard, and with that character indelibly and irreversibly, as it so happened, stamped upon him during his whole life. Yet the power of the principle upon which legitimation *per subsequens matrimonium* is founded, is so invincible as in such a case, it would seem, not even to admit of an inquiry as to whether the apparently indelible bastard was living or dead at the time of the marriage of his reputed parents, but simply whether *he was their child*, and born at a time *when they could* lawfully have intermarried' (*a*). Against this doctrine there are, however, many authorities (*b*). It is a nicer question whether the marriage would operate so as to avoid the Crown's right of escheat. The considerations of reason and justice which favour the legitimation in other cases, do not apply so strongly in this: but there does not seem to be any conclusive reason against it; and if the bastard is to be held legitimated even after his death, so as to enable his lawful children to succeed to his father, there seems no good reason why,

(*a*) *Per* Lord Meadowbank in *Rose* v. *Ross*, July 1830, 4 W. and S. App. 71, 72.

(*b*) Vinnius, Com. ad Inst. i. 10, 13. See the arguments of both parties stated in Huber. Prelect. ad Dig. lib. i. tit. 7, s. 10; Bockleman, Com. ad Pandect. vol. i. p. 49.

in the event of his having no lawful children, he should not be legitimated so as to keep his succession in the family, even in prejudice of the Crown's right (*a*). 5. It is doubtful whether legitimation can take place, so as to exclude the heir-at-law in heritage, when the marriage is entered into on deathbed. The authorities in favour of the affirmative of this, proceed upon a case reported by Craig, which appears never to have existed except in his imagination (*b*). This case is thus stated by Craig: 'I remember how Robert Master of Sempill, the father of Robert, now Lord Sempill, thirty-four years ago, ordered himself, when *in articulo mortis*, to be carried in a litter to church, where he married Joanna Hamilton, his concubine, by whom he had that nobleman, and dying only eight days after; the latter *non minus in hereditate successit quam si ex legitimo matrimonio natus fuisset.*' Now, as Craig wrote about 1600, it is clear that he here alludes to Robert Master of Sempill, who died in 1569, and whose son Robert succeeded his grandfather Robert Lord Sempill in 1572. Contemporary legal documents, however, still exist, which prove that this Robert Master of Sempill was married to Barbara Prestoun, daughter of Archibald Prestoun of Valleyfield, who was the mother of his son Robert, and who survived him, she being specially cited 16th December 1569 to see and hear executors-dative decerned to the said umquhile Robert Master of Sempill (*c*). The facts so standing, it is clear that this case can furnish no authority for the legitimation of children by a marriage on deathbed, to the prejudice of the heir-at-law; and as the authorities favourable to this legitimation are mainly based upon this case, the question may be regarded as still an undecided one. 6. It may be doubted whether the legitimation *per subsequens matrimonium* of a child born in a foreign country, through the father retaining his Scotch domicile, and subsequently marrying the mother, can make the child a natural-born subject of Great Britain. This point was discussed in the case of *Shedden* v. *Patrick*, to be afterwards on other points more fully noticed; and the Lord Chancellor thus expressed himself: 'The appellant must be held

(*a*) See More's Stair xxxiii.

(*b*) Craig ii. 13, 27. See Dirl. and Stew. p. 252; Bankt. i. 5, 57; dicta in *Kerr* v. *Martin*, *supra*; Bockleman, vol. i. p. 50; Voet. ii. 7, 11; and Pothier, Tr. Cont. Mar. Par. v. c. 2, p. 236.

(*c*) See the documentary evidence fully referred to in Riddell, Tr. pp. 155 *seq.*

to be an alien. Even on the assumption that, notwithstanding his father's long residence, he lived abroad merely as a sojourner, *animo revertendi*, and still retained his Scotch domicile; and also on the assumption that the marriage of his father, subsequent to his birth, made him (either *legitimus* or *legitimatus*) a legitimate son,—for some purposes it might make him legitimate; but did it make him a natural-born subject of her Majesty? It might be stated, that excepting the children of ambassadors, every person born abroad is an alien, but for the effect of special statute. The ruling statute, 4 Geo. II. c. 21, was very precise; and in order to come within its provisions, the appellant must make out that at the time of his birth his father was a natural-born subject. At the time of his birth, William Shedden was not the appellant's father; he was born illegitimate, and in the eye of the law was *filius nullius*. And whatever be the operation of the law in respect of parties of Scotch origin, the incapacities of alienage can never be taken away. If that marriage rendered the appellant legitimate, according to the law of Scotland, and at the same time made him a natural-born subject of her Majesty, a party might be made *in invitum* a subject of her Majesty. In the event of war with America, the appellant might lawfully take up arms against her Majesty; but the subsequent marriage of his parents might make him a traitor. The existence of a state of the law so anomalous was never contemplated by the Legislature' (*a*).

Legitimation *per rescriptum principis*, or by letters from the Sovereign.

II. By two Novels of Justinian (*b*), it was enacted, that if a father (not having lawful children) have children born out of wedlock, and wishing to legitimate them, is unable to do so, *per subsequens matrimonium*, on account of the mother's death, or some legal impediment to their marriage, the Prince, by his rescript, would grant the status of legitimacy. In subsequent times, it appears that the Popes assumed this power of the Roman emperors; and in many of their dispensations there occur clauses legitimating children (*c*). The effect of such papal legitimations in Scotland does not appear to have been the subject of judicial decision, and

(*a*) *Per* Lord Chancellor in *Shedden* v. *Patrick*, 15 May 1854, 1 Macq. 535.

(*b*) Nov. 74, c. 1, 2; and 89, c. 9.

(*c*) Ridd. Tracts, 195, 196; App. to Stuart's History of House of Stewart, pp. 427 *seq.*, where several cases of this kind are given.

Craig hesitates in regard to it. The general opinion of legal antiquaries, however, is, that it only gave legitimacy *quoad spiritualia*, enabling the bastards to hold office in the Church; but not *quoad civilia*, so as to give them the civil rights of succession (*a*). Long prior to the annihilation of the Pope's power in Scotland, rescripts by the Sovereign, as embodied in royal letters of legitimation, were issued by the Scottish kings (*b*). The effect of such letters of legitimation, though they contain, as Erskine says, 'high-sounding clauses,' is now extremely limited. They will not confer on the legitimated party any active right of succession to his father or mother, or any other relative; for the king cannot make an heir to another, when he does not exist by law. The bastard cannot therefore claim legitim with the other lawful children of his father, nor encroach in any manner upon their rights, whether they be born before or after his legitimation (*c*). Although the royal legitimation will not entitle the bastard to succeed to any relative *ab intestato*, it gives a right to those parties who would have been his heirs-at-law, had he been born in lawful wedlock, to succeed to *him;* because, failing lawful children, the Sovereign himself would have taken up the succession, and he only resigns his own right, and infringes on no right of a third party by legitimating him (*d*). The legitimation will not entitle the agnates of the bastard to succeed to any of his descendants, without a special clause to that effect in the letters (*e*). Bastards formerly could not test (*f*), and the letters of legitimation in consequence always contained a clause giving them liberty to do so. But by a late statute they have this power irrespective of legitimation (*g*).

(*a*) Riddell Stewartiana. See Fraser, Pers. and Dom. Rel. vol. i. p. 129 (*z*).

(*b*) Crawford's Lives of the Officers of State, p. 435; Balf. p. 240; Craig ii. 13, 27; Ersk. iii. 10, 7. See the Charter, printed in Ersk. Inst. App. No. 2.

(*c*) Craig ii. 18, 12; Ersk. iii. 10, 7; Ridd. Peer. and Cons. Law, p. 138.

(*d*) Ersk. iii. 10, 7.

(*e*) *Ramsay* v. *Goldie*, M. 1359 (aff. 1758); *Hunter* v. *Hunter*, M. 1362, Hailes 942 (1784).

(*f*) Balf. p. 240; Spottiswoode, *v.* Bastardy; Ersk. iii. 10, 7; *Comrs. of Berwick* v. *Craw*, M. 1351 (1678); Ridd. p. 416, note.

(*g*) 6 Will. IV. c. 22.

CHAPTER III.

INTERNATIONAL LAW RELATIVE TO LEGITIMATION PER SUBSEQUENS MATRIMONIUM.

SEEING that the law of legitimation by after marriage does not prevail in all countries, cases of conflict frequently arise between the laws of different states. The laws of England and of Scotland are on this subject totally different; and the intercourse between two countries, now united into one kingdom, has been of such a nature as to give occasion to some of the most important decisions in the law of legitimacy.

The great leading fact to be ascertained in such questions is the domicile of the father; for by the law of that domicile must the status of the children be regulated (*a*). In the cases of *Munro* and *M'Douall*, the law was thus stated by the Lord Chancellor (Cottenham): 'In both cases the question of fact remains to be considered—What was the domicile of the father? In both cases the domicile of the father was originally Scotch; and the question is, whether he had at the time of the marriage lost this domicile of origin. Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted not only by the laws of England, but generally by the laws of other countries. It is, I conceive, one of those principles, that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning

(*a*) The kind of domicile referred to in this chapter is fully explained in Fraser, Pers. and Dom. Rel. vol. i. p. 716.

his former domicile, and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley in *Somerville* v. *Somerville* (5 Vesey 787), and from which I see no reason for dissenting.' 'If, then, it be the rule of law in Scotland, that the domicile of origin must prevail, unless it be proved that the party has acquired another by residence, coupled with an intention of making that his sole residence, and abandoning the domicile of origin, I cannot think that there will be much difficulty in coming to a satisfactory conclusion, upon examining the evidence in these cases with reference to this rule' (*a*).

Domicile of father at birth and marriage, in a country where there is no legitimation.

(1.) Where the domicile of the father, at the time of the birth and subsequent marriage, is in a country which does not admit legitimation *per subsequens matrimonium*, the law of Scotland will hold the children illegitimate (*b*). This was decided in the first case of *Shedden* v. *Patrick*, where the father, though originally a Scotsman, had emigrated to America, and there became a naturalized American citizen. He lived and died there, and never lost his American domicile. He formed an illicit connection with a woman in the State of New York, where he resided, and where the law of legitimation is unknown. Having afterwards married the woman, a child previously born, founding upon this marriage as legitimating him to all Scotch purposes, claimed to be lawful heir to heritage in this country. The Court of Session held the child illegitimate; and this judgment was affirmed on appeal, because the law of the father's domicile at the birth and the marriage, did not recognise legitimation *per subsequens matrimonium* (*c*).

In *Shedden* v. *Patrick*, the father being domiciled in America,

(*a*) *Per* Lord Chancellor (Cottenham) in *Munro* v. *Munro*, *supra*, p. 35, and *Dalhousie* v. *M'Douall*, *infra*, pp. 49, 50.

(*b*) 'If by the laws of one kingdom a man born bastard is legitimated by a subsequent marriage; or, on the other hand, if by the laws of a kingdom such subsequent marriage does not, as in England, legitimate the children,—I am persuaded that the Frenchman legitimated in this way ought to be regarded as legitimate everywhere, even in England, and that the bastard Englishman who is not legitimated in England by the subsequent marriage should be held a bastard even in France.'—Boullenois, tome i. p. 62.

(*c*) *Shedden* v. *Patrick*, M. App. *v.* Foreign, 6 (1803), aff. 2 March 1808, 13 F. C. App. 8, 5 Paton App. 194; also 12 July 1849, 11 D. 1333, aff. 15 May 1854, 1 Macq. 535. The opinions of the Court in the first case will be found stated in a MS. note of Baron Hume's

'there was wanting that only circumstance upon which rests the title of the child to claim the benefit of the law of Scotland' (*a*). 'The difficulty,' said Lord President Campbell (*b*), 'which meets the pursuer at the outsetting is, that he was born a bastard, and he never enjoyed any other state in the country to which he belonged, and where his father lived and died; and nothing was ever done here to put him in any other state, nor is now possible to be done, unless it can be said that the mere opening of a succession in Scotland which, had he been a lawful child, would have devolved upon him, does *eo ipso* make him lawful.' Similar opinions were, with one exception, delivered by the other judges, and in the House of Lords the judgment was affirmed. Forty years afterwards, a summons of reduction of this judgment of the House of Lords was raised, on the ground of fraudulent concealment of various facts tending to instruct that at the time of his marriage the pursuer's father was a domiciled Scotchman. Important questions were argued as to the competency of suing a reduction of a judgment of the Court of last resort, particularly after the lapse of so long a time. But the ultimate decision of the case was grounded upon this, that even if the pursuer's father had been domiciled in Scotland, the pursuer, on his own assumption, not being at the time of his birth, but only at an after period by the subsequent marriage becoming, the son of a domiciled Scotchman, must be regarded as an alien by birth, and therefore incapable of inheriting land in Scotland (*c*).

Another case, where the domicile of the father was out of Scotland, occurred afterwards in relation to the Strathmore peerage, in which it appeared that the domicile of the father, at the time of the child's birth, and at the time of the marriage with the mother, was in England, the law of which does not admit legitimation *per subsequens matrimonium*. It was therefore held by the House of Lords, that the child was not legitimated by the marriage of his parents (*d*).

on his Session Papers, Adv. Lib.; they are reported 5 Pat. App. p. 198. In the case of *Munro* v. *Munro*, *infra*, the majority of the consulted judges appear to have thought that the *alienage* of the bastard had some influence with the Court. Nothing, however, is said as to this in the opinions quoted. See Obs. on this case by Lord Brougham, 7 Cl. and Finn. 953.

(*a*) *Per* Lord Chancellor (Cottenham) in *Munro* v. *Munro*.

(*b*) *Shedden* v. *Patrick*, 5 Paton App. 201.

(*c*) 1 Macq. 535.

(*d*) March 1821, 4 Wils. and Shaw App. 89, No. 5, and 6 Paton App.

Marriage in Scotland, and domicile out of Scotland.

(2.) In the cases of *Shedden* and *Strathmore*, the *places* of birth and of marriage, and of *domicile* at both these periods, were out of Scotland; and thus these cases were of a character the most unfavourable possible for the legitimacy. But suppose now, that only the place of birth, and of domicile at the time of birth and marriage, are out of Scotland, while the marriage itself, *de facto*, takes place in this country. The question arising out of such a state of things was waived in the *Strathmore* case, but it occurred in the case of *Ross* of Cromarty, the decision in which settled, that if a child be born out of lawful wedlock, of a father domiciled at the time of birth and marriage in a country where the law of legitimation does not exist, the child will not be legitimated by the subsequent marriage of his parents, though the marriage be in a country where that law is recognised (*a*). 'The parties were domiciled in England,—the child was born in England,—the marriage did not take place indeed in England, but the parties went to Scotland for the purpose expressly of being married; and having been married, they returned to England, to the place of their former domicile. I am of opinion, upon that ground, that the judgment of the Court below ought to be reversed' (*b*). 'I further apply the decision,' says Boullenois (*c*), 'to an English child, born in England in a state of concubinage, and whose English father and mother have come to live in France, and have there been married *without being naturalized;* because, being truly strangers, and as such subject to the laws of England, their child cannot, in accordance with these laws, be bastard in England and regarded as legitimate in France, because he bears with him everywhere the status and condition with which he is invested by the law of his own nation, *i.e.* domicile.'

Domicile at birth and marriage in England, but marriage and birth in Scotland.

(3.) Where the birth and marriage are in Scotland, while the *domicile* of the father at both periods is in England, or in some other country in which the law of legitimation is unknown, it is undecided whether the child will be legitimated. This point may,

645. See observations on this case in *Munro* v. *Munro*, *infra*. For an illustration of the rule that the validity of a *marriage* is to be judged of by the law of the place of celebration, see *Cullen* v. *Gosage*, 1 Feb. 1850, 12 D. 633, and observations of Lord Chancellor (Cottenham) in *Munro* v. *Munro*, *infra*, pp. 49, 50.

(*a*) *Rose* v. *Ross*, 15 May 1827. Revd. 16 July 1830, 4 W. S. 289.

(*b*) *Per* Lord Chancellor in *Rose* v. *Ross*.

(*c*) Boullenois, tome i. p. 62.

however, be considered as set at rest, against the legitimacy of the child, on the principle of the decision in the cases of *Ross* and *Munro*. The mere fact of the *place* of birth and marriage being in this country, has no effect upon a question which must be determined by the law of domicile. The only point of doubt, as shall afterwards be seen, is whether the law of the father's domicile at birth or that at marriage shall settle the legitimacy, when the two happen to be different (*a*).

Domicile in Scotland, and birth and marriage in England.

(4.) Reversing now the order which has been observed, let the domicile of the father, at the birth and marriage, be placed in Scotland, while the birth and the actual marriage are in England, the converse of the rules already stated holds. In such a case (which is putting the facts of birth and of marriage at once against the circumstance of domicile) the child would be legitimate, because the marriage would, on account of the domicile, be a *Scotch* marriage as to all its incidents and consequences; and legitimation of previous issue is one of the incidents of such a Scotch marriage. This was the doctrine expressly determined by the case of *Munro* (*b*). In that case, the only question on which a serious difference of opinion arose, was the question of fact, whether at the time of the birth and marriage the domicile of Sir Hugh Munro was Scotch or English. And, while upon that point the Court of Session, by a majority of seven to six, held the domicile to be English, which on appeal was reversed, on the other—the question of law—they were all but unanimous in holding that if the domicile were Scotch, the fact of birth and marriage being both in England did not interfere with the legal operation as to all its effects, of what would then be a Scotch marriage. 'Assuming his domicile at both the birth and marriage to have been in Scotland, it is beyond doubt that the mere fact of the celebration of the marriage in England is immaterial: for it is a general rule that all contracts shall have reference to the place where they are to be implemented; and this is more especially the case as to marriage, by which the status of the parties and their offspring is to be determined. On this point, Huber, Hertius, and all the

(*a*) See *dicta* in the case of *Aikman* v. *Aikman*, 17 March 1859, 21 D. 757, aff. March 1861, 3 Macq. 854.

(*b*) *Munro* v. *Munro*, 15 Nov. 1837, revd. 10 Aug. 1840, 1 Rob. 492, and 7 Clark and Fin. 871.

more recent jurists of name, are agreed' (*a*). The ground upon which the Lord President differed from the other judges on this point, was the supposed *indelible* character of the stain of bastardy affixed on the pursuer by her being born in England before the marriage of her parents. In reference to this, it was observed (*b*): 'Assuming Sir Hugh Munro to have been a domiciled Scotchman at the date of his marriage with the pursuer's mother, we are of opinion that that marriage, though celebrated in England, must be considered as in law a Scotch marriage, in respect of all the incidents and consequents of that marriage; and as it is one of the incidents of such a marriage, that the child of the parents so married, at whatever time born, is legitimate, it follows that the pursuer was by the effect of the marriage under the law of the domicile effectually secured in her right as the legitimate daughter of her father.' 'To say that the pursuer was born illegitimate, because her parents were not married at the time of her birth, is to say no more than could be said in any such case, whether the child were born in Scotland or in England. As a matter of fact, it is true in every case, that, till the marriage, the child is illegitimate. Such a fact, therefore, does not in the least advance the argument for the point to be made out. To say, again, that because the child was born in England of an English mother, the illegitimacy is indelible,—if this means that the illegitimacy is indelible by the law of England and under the law of England,—is to say no more than that the law of England has not adopted the rule of legitimation *per subsequens matrimonium*. But if it be meant, that because the child was born in England it cannot become legitimate in Scotland by a Scotch marriage, in a question to be determined by the law of Scotland, it is a *petitio principii*, for which there is no authority whatever in that law.' 'We are here in a Scotch question, and in a Scotch court, applying a plain rule of our own law; and unless that law says, that if the child be born in England it shall not have the benefit of the rule, we do not see how it is at all material that it could not enjoy it, if the law of England applied to the case. But we know of no such exception in the law of Scotland; nor, so far

(*a*) *Per* Lord Corehouse (Ordinary) in *Munro* v. *Munro*.

(*b*) Opinion of Lords Glenlee, Medwyn, Moncreiff, and Cockburn, in *Munro*, *supra*.

as we are informed, is there any such exception recognised in the law of any country, which holds the principle of legitimation *per subsequens matrimonium.*' On appeal, the law thus stated by almost the whole of the Scotch judges was confirmed by the House of Lords. The Lord Chancellor (Lord Cottenham) observed: 'The first point to be considered is the rule of the law of Scotland as to the effect of the subsequent marriage of a domiciled Scotchman upon the issue of the parties born before the marriage, when the birth of such issue and the ceremony of marriage took place out of Scotland.' 'Wherever a marriage follows the birth of children procreated of the parties to the marriage, all the requisites concur which are required by the terms in which the rule is laid down, assuming always that the circumstances are such as to bring the case within the operation of the law of Scotland; and as the laws of every country generally affect all those who have their domicile in such country, it would appear that, in order to bring any particular case within this rule of the law of Scotland, it would only be necessary to show that the domicile of the parties was Scotch.' 'It can hardly be contended that the country in which the marriage takes place is material; it has never been considered material by the writers upon civil law, nor so treated in the decisions of the Courts. In *De Conty's* case, the marriage, although it took place in England, conferred legitimacy on a child whose domicile of origin was in France. The law of the country where the marriage is celebrated ascertained its validity: the law of the country of the domicile regulated its civil consequences. But if the place of the marriage be not material, still less can the place of the birth be so' (*a*). And Lord Brougham thus expressed himself: 'Upon the whole, your Lordships are entitled, or rather are called upon, to consider that at the period of the marriage the Scotch domicile had not been changed, and that the parties were domiciled as Scotch parties at the time when the contract took place. The consequence of this will be, that if your Lordships adopt the opinion of my noble and learned friend upon the subject, upon those two points you will concur, on the question of law, with almost the whole of the learned judges; that you will upon that question give a decision which is in concurrence with the principles of the former cases which approach the nearest to the present; and that you will

(*a*) 7 Clark and Finnelly 872.

give a judgment, in my humble apprehension, which is consistent with all the principles of the law governing such matters.'

Domicile and marriage in Scotland, and birth only in England.

(5.) After the decision in *Munro*, it is a matter of supererogation to add, that if the father be *domiciled* in Scotland, *where the marriage afterwards takes place*, the child will be legitimate by that marriage, notwithstanding that the *birth* took place in England. This was the *species facti* in the first case of *M'Douall* of Logan, decided on the same day with that of *Munro;* and as it was included in that case, the Court of last resort only reasoned upon the former, in which, in addition to the circumstance that the *birth* was in England, there was also this other fact, that the *marriage* took place there also (*a*). It is a singular circumstance that the same judgment was given on the same *species facti* in another case of *M'Douall* of Logan (*b*). The same *species facti* occurred again in a recent case, where the judgment was unanimously followed both in the Court of Session and the House of Lords, the only question seriously disputed being whether the Scotch domicile had been abandoned or not (*c*).

The domicile is that of marriage, not of birth.

(6.) In all these cases it will be seen that it is not the law of the place of birth or of marriage, but of domicile, which is the *regula regulans* for determining the status of the children, and the other incidents of marriage. It is of importance also to mark what domicile is here referred to—whether of birth or of marriage; for they may conflict, though that case has not yet occurred for decision. In the case of *Munro*, nearly the whole Court of Session were unanimous in expressing an opinion (which, however, was not necessary for the judgment), that where the domicile of the father at the time of birth, and at the time of marriage, is different, the law of the latter will be preferred: *e.g.* if a father, domiciled in England at the birth, be domiciled in Scotland at the marriage, the child will be legitimate; and *e converso*, if the father be domiciled in Scotland at the birth, and in England at the marriage, the child will be a bastard, because legitimation does not flow from an *English* marriage; this being English, because the domicile at marriage is so. This opinion is in contradiction to that sanctioned by several

(*a*) *M'Douall* v. *Dalhousie*, 15 Nov. 1837, aff. 10 Aug. 1840, 1 Rob. 475.

(*b*) *M'Douall* v. *M'Douall*, 18 Feb. 1852, 14 D. 525.

(*c*) *Aikman* v. *Aikman*, 17 March 1859, 21 D. 757, aff. March 1861, 3 Macq. 854.

jurists who have treated of this branch of law. They maintain that the general rule, which holds all the incidents of marriage to flow from the law of the matrimonial domicile (that is, the domicile at the time of marriage), ought here to find an exception; and they therefore hold, that the law of the father's domicile at the time of birth, ought alone to declare whether the child shall be legitimated by the subsequent marriage of the parents (*a*). It is not very easy to understand the reasonings on which an exception to the general rule should be made in this case. One of the most profound of all the writers who have ever discussed this branch of law entertains a different opinion on this subject (*b*).

When status is once fixed, no change of domicile will alter it.

(7.) After the status is once fixed, whether by the law of the domicile of birth or by that of marriage, *that* status will be for ever unchangeable, whatever may thereafter be the mutations of domicile of the parents or the children. Thus, if the domicile—the law of which fixes the status—were in England, the mere circumstance of afterwards coming to Scotland would not change the status of illegitimacy of the child. Nor would it in the slightest degree affect the question, although the parents had gone through a second marriage ceremony in Scotland,—because they were already married in England; and the mere repetition of the ceremony by them could no more alter the status of illegitimacy already affixed to the child, than it could alter their own (*c*). The character of lawful child is indelible when once constituted by a marriage or legitimation, and must be an inherent quality in that person all the world over. This at least is the general result of the *jus gentium universally*. If there be any country or place where it is otherwise, this must arise from some particular arbitrary constitution, which cannot bind other countries, being against the fixed principles of general law all over the world (*d*).

The domicile of the mother has no influence on the status of the children.

(8.) Whatever may be the domicile of the mother, it will not influence the decision as to the legitimacy of the child. It is the father's domicile that must be looked to. 'I observe,' said Lord Corehouse in the case of *Munro*, 'that a doubt has been started,

(*a*) See their views digested in 1 Burge Com. 104.

(*b*) 1 Boullenois, p. 62.

(*c*) *Per* Lord Corehouse in *Munro*, *supra*, p. 49.

(*d*) *Per* Lord President Campbell in *Shedden* v. *Patrick*, 5 Paton 199.

whether this effect (legitimation) would have taken place, on the ground that Lady Munro was domiciled in England at that period, because the only recognised parent of an illegitimate child is the mother. I do not think that there is any room for that doubt. By the nuptial benediction, Sir Hugh's Scotch domicile, in the case supposed, would, *eo ipso*, have become the domicile of his wife and his child, and the child would simultaneously have acquired her father's domicile, and the benefit of the Scotch law of legitimation' (*a*).

The *lex domicilii* will regulate the status though the child claim real estate in Scotland. Whether Scotch legitimation is admitted in England?

(9.) If a child be not legitimated by the law of the country of his father's domicile, he will be barred from succeeding to a *real* estate in this country; because although real estate in this as in most other nations in the world, is regulated in its modes of transmission and conveyance by the municipal laws of the nation where it is situated, yet, where a person claims a real estate here in virtue of his relationship to another party, his claim to that relationship must first be established, according to the rules for ascertaining the status of legitimacy, without being mixed up with the consequences which flow from the relationship (*b*).

It is true that, in certain cases, children legitimated by the law of one country will not enjoy all the rights of legitimacy in another; and, in particular, a child legitimated *per subsequens matrimonium* in Scotland cannot succeed to soccage lands in England. This has been determined in the English case of *Birtwhistle* v. *Vardill*. A person came from England to Scotland, and resided and was domiciled in this country till his death. He cohabited with an unmarried woman during the whole period of his residence in Scotland, and had by her a son, who was born in Scotland. Several years after the birth of the son, the father and mother intermarried, thereby legitimating their child; and the point for determination was, whether he was entitled to succeed to real estate in England? The judges of England gave it as their opinion that the son was not entitled to such property as the heir of his father. Their reasons for this opinion were, that it was ever a rule or maxim of the law of England, with respect to the descent of land in Eng-

(*a*) See *Cullen* v. *Gossage*, 1 Feb. 1850, 12 D. 633.

(*b*) *Shedden* v. *Patrick*, *supra*, p. 16: and *per* Lord Corehouse in *Munro*, *supra*. It was on this ground that the first decision of the Court of Session in the case of *Fenton* v. *Livingstone* proceeded, 27 May 1856, 18 D. 888.

land from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi;* this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; that this rule of descent, being a rule of positive law, annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy upon the supposed ground of the comity of nations. But while the learned judges were thus willing to recognise the personal status of legitimacy, yet they would not grant all the incidents which result from legitimacy by the law of England. They maintained that they were entitled to examine into the manner in which that status was conferred; and if it was not in a particular form, they refused to recognise the party as the heir of his father's real estate. This opinion was delivered by Lord Chief Justice Tindal on 20th July 1840; and the House of Lords, on the motion of the Lord Chancellor, delayed consideration of the case. Lord Brougham, in agreeing to this motion, said that he 'doubted the latter part of the reasoning,' and seemed to think that it ran counter to the opinions expressed by him in the case of *Warrender* in 1835. The case again came before the House of Lords, when Lord Brougham still disagreed with the judges; but the Lord Chancellor Cottenham being of the same opinion with them, the judgment of the Court below was affirmed (*a*). And thus a child, legitimate to all purposes in Scotland, is denied the full rights of a lawful child in England, though his personal status of legitimacy is even there admitted, and the rights of a legitimate child in part conceded to him (*b*). He is there *pro parte legitimus; pro parte illegitimus* (*c*). This half legitimacy was a doctrine sanctioned by Lord Stair with reference to the offspring of divorced

(*a*) 2 Clark and Fin. 571–80, Sept. 1835; and again in 7 Cl. and Fin. p. 895, and in 4 Jurist 1076, and in 1 Robinson App. Ca. 627–652, 10 Aug. 1840.

(*b*) See a commentary on this decision in Ridd. Peer. and Cons. Law, pp. 420–426.

(*c*) See a clear and ample commentary on the bearing of this case on the law of legitimacy in Story's Conflict of Laws, secs. 93 *seq.*

adulterers; such offspring by positive statute being barred from succession, though not declared unlawful (*a*). The English courts have since applied this decision to the case of a father succeeding to the child, and have held that where a domiciled Scotchman had a son born out of wedlock in Scotland, and subsequently married the mother in Scotland, he could not succeed to his son who predeceased him, dying seised of land in England (*b*). But the denial by the English courts of some of the rights of legitimacy to a child legitimated in this country, does not alter the general rule, that the child must have his legitimacy settled by the law of his parent's domicile, and not by the law of the *situs* of the real estate. The English courts, while recognising this doctrine, only denied to the child some of the incidents of legitimacy, which the law, which conferred the status, gave him (*c*).

Foreign status of legitimacy not recognised if derived from an incestuous origin.

(10.) If the status of legitimacy be derived from a foreign marriage which the law of Scotland considers incestuous or contrary to the public policy of the nation (as polygamy), such status of legitimacy will not be recognised in Scotland. This constitutes an exception to the general rule of international law, that a status held by the law of the domicile shall be recognised all the world over (*d*); and notwithstanding some doubts expressed in a recent case (*e*), it may be laid down that the principle on which this exception to the general rule rests, makes the exception as applicable to the case where the legitimacy is sought to be recognised in Scotland, with reference to *moveable* succession and to honours, as it is to real estate.

This exception to the general rule, the First Division of the Court of Session refused, in *Fenton* v. *Livingstone* (on very singular grounds), to recognise. In the course of his remarks, Lord Deas observed (23 D. p. 381): 'I acknowledge the *exception* which the House of Lords have laid down. We should never have doubted it had we thought that, by acknowledging the legitimacy, we were acknowledging the validity of the marriage. Had it been our law,

(*a*) *Supra*, p. 21.

(*b*) *In re Don*, 1857, 3 Jur. N. S. 1192; 27 L. J. Chan. 98.

(*c*) See this explained by Lord Corchouse in *Munro* v. *Munro*, *supra*.

(*d*) This subject is discussed at length in reference to the validity of such a marriage in another treatise. See Fraser on Husband and Wife, 2d ed.; and *Fenton* v. *Livingstone*, 3 Macq. p. 497, and 23 D. B. M. 366.

(*e*) *Per* Lord Chelmsford in *Fenton* v. *Livingstone*, *ibid.* *Per* Lord President M'Neill in 23 D. B. M. p. 373.

as it is the English law, that to prove legitimacy you must prove the child to have been born in lawful wedlock, we should at once have held the case to fall within the exception. But the substantive question with us being legitimacy, however attained—to which the marriage is merely incidental—we thought we were not called upon to go beyond the substantive question, and inquire into the incident which could not be inquired into by the law of the domicile.' The view of the learned judge here is—that the law of Scotland does not require, in order to confer the status of legitimacy, that a child shall be born of a marriage; and the same view is suggested by the Lord President, who says that the 'status of legitimacy is not by our law confined to the offspring of a lawful and valid marriage, even in the case of domiciled Scotsmen. On the contrary, it is conceded to the offspring of connections which, if rigidly dealt with according to their real character, would be reprobated by the law, the religion, and the morality of the country' (18 D. p. 892). With submission, these statements are without authority in the law of Scotland. It is conjectured that the learned judges had in view the case of legitimacy from putative marriage,—a legitimacy having its basis in the dictates of humanity, and conferred upon children because of the good faith of their parents. A putative marriage,—for there must still be a marriage, —the basis of which is good faith, is not well designated as an object of reprobation to the morality and religion of the country. This is a case of exceptional legitimacy, where there must be at least the form of a public marriage; but this exception does not warrant the statement that legitimacy in Scotland can be derived from any other source than that from which it is derived according to the laws of every civilised country, viz. a lawful marriage. It is, too, a singular view to regard an inquiry into the lawfulness of the marriage as 'incidental' to an inquiry into the matter of legitimacy. Is not the converse proposition the correct one, that legitimacy is incidental to the inquiry into the lawfulness of the marriage; for when once the marriage is established, the legitimacy follows as a matter of course?

The House of Lords set the matter right, by reversing the judgment of the Court of Session,—a judgment which, if it had been allowed to stand, would have landed the courts in inextri-

cable and absurd contradictions. If the view of the Court of Session were right, then, if the woman had survived the father of the incestuous child, she would have been entitled to her terce. The Court, however, protested that by recognising the legitimacy of the issue, they did not recognise the validity of the marriage; but it would certainly be a curious law which would hang the parents (if they came to Scotland) for incest, and at the same time recognise the legitimacy of the issue of these very persons. The view of the House of Lords was, that if the law of Scotland must refuse to acknowledge the validity of the marriage on the ground of its being abhorrent to public policy, vile and abominable and contrary to the Word of God, it must in like manner refuse all recognition of the immediate incidents of such a connection.

Court bound to inquire from what source a foreign status of legitimacy is derived.

(11.) Whenever a status of legitimacy acquired according to the law of a foreign domicile is asserted in Scotland, the Scotch courts are entitled and bound to inquire into the mode in which such status is acquired, and as to the source from whence it comes. No local rule of the law of domicile forbidding inquiry into the facts, will be of any avail whatever in the courts of a foreign country. Thus, by the law of England (prior to the Act 5 and 6 Will. IV. c. 54), the marriage of a widower with the sister of his deceased wife was invalid and null; but the nullity of the marriage, *so as to have the effect of bastardizing the issue*, was not allowed to be declared and ascertained by English law after the death of either parent. The children thus were recognised as legitimate, though, if inquiry had been permitted, they would have been found illegitimate. 'At first, by our own law, these marriages were not only null and void *ab initio*, but always continued so. It has been truly stated, that it was the interference of the common law courts which in such cases prohibited the spiritual courts from bastardizing the issue after the death of one of the parties, that created the distinction, the very unnatural distinction, of *voidable* and *void;* for voidable is void *ab initio*' (*a*). Such marriages in England were not merely null *ab initio* when the sentence was pronounced, but the contracting parties were punishable for incest. And this doctrine was held coincidently with the rule, that the civil courts would prevent the ecclesiastical courts from

(*a*) *Per* Dr Lushington in *Ray* v. *Sherwood*, 1 Curteis 188.

declaring the invalidity of the marriage after the death of one of the parties. The civil courts prohibited the ecclesiastical from declaring the nullity, when the object was to bastardize the issue. But they did not issue such a prohibition when the object of the ecclesiastical court, in inquiring as to the validity of the marriage, was to punish the surviving spouse for the incest (*a*).

This forensic rule was pleaded in the Court of Session in the case of *Fenton* v. *Livingstone* (*b*), as excluding all inquiry even in a Scottish Court as to whether the person claiming the status of legitimacy had that status in point of fact by the law of his domicile; and the Court of Session sustained this plea and refused to make any inquiry, because the English courts could not make inquiry, and therefore sustained the legitimacy. The House of Lords reversed this judgment, and informed the Court of Session that such inquiry ought to be made; and further, the Lords stated their opinion, for the information of the Scottish judges, that the law of England held the marriage of a widower with his wife's sister to be null, and the issue to be illegitimate. Thus instructed, the Court of Session, on a remit to them, applied the rule of international law, that there being no valid marriage by the law of domicile, and there being no status of legitimacy by that law, Alexander Livingstone was illegitimate. One of the judges dissented from this view, and notwithstanding the reversal by the House of Lords, considered himself entitled still to uphold the legitimacy, so far as regarded this objection. 'It is said the marriage was void in the country in which it was made. True, it was void in this sense, that it was subject to be declared void *ab initio* in the lifetime of the contracting parties. But that was not done, and cannot now be done. The marriage was a regular marriage in *facie ecclesiæ*, unobjectionable in every respect, unless we inquire into a latent disqualification which the law of England will not and cannot inquire into. If this disqualification implies by our own law the crime of incest, I admit we must inquire into and give effect to it, although the law of England by refusing inquiry covers

(*a*) *Per* Sir Herbert Jenner, 1 Curteis 199; *Harris* v. *Hicks*, 2 Salk. 548; *Brownsword* v. *Edwards*, 2 Vesey sen. 242.

(*b*) 27 May 1856, 18 D. 865; reversed and remitted, 3 Macq. 497; finally decided, 24 Jan. 1861, 23 D. B. M. 366.

up and virtually effaces the disqualification as respects its bearing upon legitimacy. But if by our own law it is no disqualification at all, why are we to give an effect to the law of England which the law of England does not and cannot give to itself?

'Let it be that the statute, barring inquiry, has no effect beyond the territory, and therefore that it cannot compel us to accept as lawful a marriage which our own law declares to be incestuous: so neither could the whole marriage laws of England. But when our own law adopts the law of the territory, we must adopt it as it is in its entirety; not take part and reject part, as if it were a favourite object with our law to hold one who is legitimate in England a bastard in Scotland' (*a*).

The reasoning is curious, and the opinion is confidently entertained, for it was twice delivered, and delivered, too, after the House of Lords had in this very case declared it to be erroneous. The liberality of the Scottish courts in this matter was also the more remarkable, seeing that the English courts, in *Birtwhistle* v. *Vardill*, *supra*, p. 54, had treated a local Scottish rule pleaded in support of a claim of legitimacy in a somewhat different fashion. In that case, the English courts were met by the rule (assumed prior to *Kerr* v. *Martin*, *supra*, p. 37, to be law), that a person legitimated *per subsequens matrimonium* was presumed, *juris et de jure*, to have

(*a*) *Per* Lord Deas, 23 D. 380. Lord Deas further said, that 'the plea now pressed upon us by the pursuer as his primary and prejudicial plea, that we ought to decide in his favour without entering upon the Scots law of incest at all, is an entirely new plea in the case, never insisted in before us so long as there was a contradictor in the field, and in itself, to say the least of it, of a very subtle kind' (p. 379). The learned judge was here labouring under a mistake. If his Lordship had turned to the report of the first discussion (18 D. 880), he would have there found the very plea taken, and pressed upon the Court when there was a contradictor. The speeches of counsel were separately published, and the argument on the plea occupies many pages. It was insisted in at length as one of the grounds of appeal, also when there was a contradictor. But although the plea was thus pressed on the Court of Session from the very outset, it is just as clear that it must have been overlooked; because, in giving his judgment in 1856, Lord Deas stated that 'the proposition we now affirm simply is, that the child being legitimate by the law of the domicile, must be held to be legitimate here. *True, his legitimacy depends upon the validity of the marriage of his parents; but all we judicially know of that marriage is that it was regular and valid in the country where it took place*' (18 D. 905). Of course an error like this on a point so important underwent due commentary in the House of Lords,—and considerably furthered the interests of the appellant.

been procreated of a marriage which was in existence at the time he was begotten. This fiction was by the law of Scotland (as then assumed) incapable of being redargued; and if this rule were to be taken as a part of international law by which a status according to the law of the domicile is a status all the world over, then no question could have arisen in *Birtwhistle* v. *Vardill.* The English courts would have been bound to have given effect to the status as one derived from a lawful marriage. The matter was, however, thus disposed of by the English judges (*a*): 'It is then contended, that as by the Scotch law there is a *presumptio juris et de jure* that under the circumstances supposed the parents of B. were actually married to each other before the birth of B.; so such presumption of the Scotch law by which his legitimacy is effected must also be adopted and received to the same extent in the English courts of justice. Now there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom. But it does not therefore follow, that with the adoption of the marriage contract the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated. That the marriage in question was not celebrated, in fact, until after the birth of B., is to be assumed from the form of the question. Indeed, except on that supposition, there would be no question at all. Does it follow, then, that because the Scotch hold a marriage celebrated between the parents after the birth of a child to be conclusive proof of an actual marriage before, a foreign country which adopts the marriage as complete and binding as a contract of marriage must also adopt this consequence? No authority has been cited from any jurist or writer on the subject of the law of nations to that effect,—nothing beyond the general proposition, that a party legitimate in one country is to be held legitimate all over the world.' 'Now, it would never be contended by any jurist that the law of England, with respect to the succession of land in England, would be bound to adopt a positive law of succession like that which holds in France, the distinction being so well known between laws that

(*a*) 1 Rob. App. p. 627.

relate to personal status and personal contracts, and those which relate to real and immovable property, for which it is unnecessary to make reference to any other authority than that of Dr Story, in his admirable Commentaries on the Conflict of Laws (see sec. 430, and following, where all the authorities are brought together); and if such positive law is not upon any principle to be introduced to control the English law of descent, what ground is there for the introduction into the English law of descents not only of the contract of marriage observed in another country, which is admitted to be adopted, but also of a fiction with respect to the time of the marriage,—that is, in effect, of a rule of evidence which the foreign country thinks it right to hold?'

Courts not bound by rules of evidence or forensic rules of foreign courts.

The Court of Session thought, in *Fenton* v. *Livingstone*, that the answer to this judgment was, that the case was governed by a positive statute, and that it established no general rule. The doctrine is, that although a status lawfully obtained shall be recognised by a foreign court, yet the foreign court is not bound *by the rules of evidence* by which the law of the domicile was controlled. If, for example, by the law of the domicile, evidence sufficient to establish that a party was the offspring of a lawful marriage was inadmissible, on account of the religious opinions or other personal local incapacity attaching to the witnesses, the law of a foreign country would not be bound by such restrictions, but would admit the evidence. A distinction must be always made between what refers to the constitution of a contract, and what refers to the performance or enforcement of it. Thus there are statutes of limitations as regards time, regulating the period in which effect would be given to contracts; or altering the mode of proof after a number of years, by restricting it to writ or oath, and excluding parole evidence. In England there is the statute of limitations, and in Scotland the various statutes regulating prescription. The English statute of limitations did not provide that a debt if not recovered within six years was to be held as not due, but that beyond that time the English courts would not give their aid to the creditor to recover his debt. In *Fenton* v. *Livingstone*, the rule of the English law established a limitation, not by the lapse of a certain time, but by the occurrence of a certain event. In principle there was no distinction between these two limitations; and the reasoning

of Lord Brougham in the case of *Don* v. *Lipman*, and the judgment of the House of Lords in that case, render it unnecessary to cite further authority (*a*).

Now, in what respect is the rule of the English law by which inquiry is barred as to the incestuous character of marriage from which the claimant in *Fenton* v. *Livingstone* derived his status, to be distinguished from any other rule of practice of the English courts or municipal regulation, which foreign courts are not bound to regard? It certainly comes more under the category of a rule of practice of an English court, than many other cases which excited, during the present century, controversies which are scarcely yet at rest. According to the law of England, marriage was indissoluble except by Act of Parliament. This was contended to be of the essence of the contract; and it was a doctrine more entitled to be deferred to by the Scotch courts than the rule of practice in regard to incestuous marriages. But the Scotch courts asserted their right to dissolve an English marriage. Why did the Scotch courts refuse to listen to the plea that an English marriage was by the law of England—the place of contract—indissoluble? Because the English practice was inconsistent with the Scotch municipal law, which allowed divorce on the ground of adultery or of wilful desertion. The Scotch rule was founded, not on the ground of punishment, but of public policy and private remedy,—it being held not to be fitting that one of the spouses should be obliged to continue in the marriage relation with the other who had committed adultery; and this was a rule to be given effect to notwithstanding the law of the place of contract.

This principle might be further illustrated by many examples. Adultery was a good ground of divorce by the law of Scotland. There was no time fixed by that law within which the suit must be brought. Suppose a suit of divorce brought in the Court of Session by a husband against his wife for adultery committed while they were domiciled in a foreign country, where the suit of divorce was required to be raised within twelve months of the commission of the adultery, the Scotch courts would give decree of divorce notwithstanding the lapse of the period of twelve months. Or, take a case where adultery having been committed

(*a*) 2 Sh. and M'Lean, p. 723.

in Scotland, the parties afterwards go to a foreign country, where condonation is not a good answer to a suit of divorce, it is no reason for not granting the divorce in the foreign court that the plea of condonation was allowed by the Scotch law.

Again, take cases of nullity of marriage on the ground of impotency or pupillarity. Suppose the law of a country to allow no inquiry whether married persons were under puberty at the time of their marriage unless the marriage was challenged before puberty, and that two persons in this relation came to Scotland, would the answer that, by the law of the place of contract, the time for challenge had passed, be sustained as an answer to the nullity? The limitation in that case would be by the occurrence of an event. That question would be decided by the *lex fori*, not by the *lex loci contractus* or the *lex domicilii*.

Still further, take the case of a decree of divorce pronounced by a Scottish court, which cannot be challenged in Scotland after a year and day from the time when it was pronounced. A foreign court would not be bound by this local rule, but would be entitled and bound to inquire whether the Scottish court had jurisdiction to pronounce; and such decrees have often been set aside by foreign courts long after a year and day from their date (*a*).

(*a*) See Fraser on Conflict of Laws in questions of Divorce, where the whole of these cases are cited and commented on.

CHAPTER IV.

RIGHTS AND OBLIGATIONS OF PARENTS AND CHILDREN.

SECTION I.

POWER OF PARENT OVER THE CHILD.

ACCORDING to all systems of law, the father has a certain power over his child,—in regard to the principle of which there has been some dispute (*a*). But that the power does to some extent exist, is clearly admitted everywhere, although it varies in its extent and in its duration in different systems.

What children are under the father's power.

I. The authorities in the law of Scotland differ as to the duration of the parental power. Some of them hold that it continues after the child's majority (*b*); others, that it terminates entirely at that period (*c*). A third opinion, and one more supported by the analogy of the law of minor and curator, is, that the father's power over the *person* of the child, or his right to direct and superintend his education, or to compel him to live in the father's family, and contribute his earnings to the support of the household, is entirely at an end, at the age of fourteen if a male, or twelve if a female; in short, when the period of pupillarity is past (*d*). *In hoc igitur conflictu quibus adstipulabimur?* This matter was considered though not decided in the recent case of *Harvey* (*e*), the facts of which, as illustrating another branch of this subject, will be more fully

(*a*) Grot. de Jure Belli ac Pacis, lib. ii. c. 5, sec. 2; Rutherforth's Institute Nat. Law, p. 149.

(*b*) Stair i. 5, 13, along with sections 5, 6, and 8; Dirl. and Stew. *v.* Emancipatio.

(*c*) Ersk. i. 6, 55; Ersk. Prin. i. 7, 36; Hutch. Justice, vol. ii. p. 255.

(*d*) Balf. p. 337; Bankt. i. 6, 1, p. 153; More's Stair, p. 31, notes; Lectures, i. p. 87; Wallace, p. 282.

(*e*) *Harvey* v. *Harvey and Others*, 15 June 1860, 22 D. 1198.

referred to hereafter. A father in that case sought the custody of two children, a boy aged sixteen, and a girl aged fourteen, they having for a number of years been in the custody of their mother, (from whom he was divorced,) and her relations. For the father it was contended, that he had an absolute legal right to the custody of his children up to majority, which the Court could not interfere with, unless it were shown to be dangerous to the child's life or morals to allow it to remain with the father. The opinion of the Court was delivered by the Lord Justice-Clerk, who observed: 'The facts of this case are very peculiar. Before considering their bearing and effect, it is necessary that we should have as precise an idea as we can attain of the correlative rights and duties of a father, and his children when they are above pupillarity and under majority. It is not, and cannot be maintained, that the parental authority is the same either in kind or degree, when the child is beyond as when he is in pupillarity. The absolute legal incapacity of a pupil is such, that jurists have not inaptly styled the father's power over a child of those tender years a right of dominion. But in puberty legal incapacity has come to an end; and though the law places minors *puberes* under guardianship, they can themselves legally act in all cases with the advice and consent of their guardians, and in some cases without any aid or consent.' 'Whether curators be named by the minor himself or by the father, he is entitled to choose his own place of residence, without their consent, or even against their advice. No doubt this liberty is more abridged during the lifetime of the father, from the greater respect which the law pays to his original and undelegated authority; and the Court have no desire to give countenance to a doctrine which should enable any girl, on attaining the age of twelve, if possessed of independent fortune, to desert the paternal mansion, and fix her own present residence, and thereby probably her future fate and course of life, in defiance of all parental control. But even during the father's life there are some legal acts which the minor may perform effectually without his father's consent or knowledge, which indicate a recognition by the law, of a power of rational choice on the part of a minor of a very high character. Thus he can make his will, and he can marry; and both the will and the marriage will be effectual, notwithstanding any opposition which the father can offer.'

'Though it would be extremely difficult, if not impossible, to define with precision and accuracy the limits of the *patria potestas* in the case of a child in puberty, this short review of the legal relation of a father and his child at that age seems to lead naturally and safely to the establishment of these four practical propositions: 1. That the control to which a *minor pubes* is subjected does not proceed on any notion of his incapacity to exercise a rational judgment or choice, but rather arises on the one hand from a consideration of the reverence and obedience to parents which both the law of nature and the divine law enjoin, and from a regard to the inexperience and immaturity of judgment on the part of the child, which require friendly and affectionate counsel and aid. 2. That the power of a father at this age is conferred not as a right of dominion, or even as a privilege for the father's own benefit or pleasure, but merely, or at least mainly, for the benefit, guidance, and comfort of the child. 3. That therefore the father's authority and right of control may, at this age of the child, be easily lost, either by an apparent intention to abandon it and leave the child to his own guidance, or by circumstances or conduct showing the father's inability or unwillingness, to discharge rightly the parental duty towards his child. 4. That in all questions as to the loss of the parental control during puberty from any of these causes, the wishes and feelings of the child are entitled to a degree of weight corresponding to the amount of intelligence and right feeling which he may exhibit.'

Extent of the parent's power.

II. The parent's authority is so supreme and absolute, that all the actions of the child, so long as subject to his authority, are to be guided by the parent; and the will of the child is concluded by that of his father. This doctrine is, however, restricted to cases of civil concern; for pupils are responsible for crimes. The rights and duties of the father in reference to property,—as administrator-in-law, or tutor or curator of his child, in common with other tutors and curators,—will be considered hereafter. The *patria potestas* is here only considered in so far as relates to the person, and to those duties and rights which are exclusively dependent on fathership, and which are not imposed upon or enjoyed by other guardians.

Custody of lawful children.

The father is entitled to the custody of the child, and may remove it from place to place, and from one country to another. The par-

ticular house of residence he thinks it should occupy, he may point out; and it may be either his own or a separate establishment. He can recover its person from any one who retains it, although the person guilty of the detention should be its own mother (*a*).

Law of England as to custody of children.

The common law of England is express in drawing a distinction between the powers of a father over lawful and those over bastard children. The custody of bastard children, and the principles which apply in that class of cases, will be treated of hereafter. As regards lawful children, a father is at common law entitled to the custody even at the earliest age (*b*); and in one case it was held that he could take the child from the mother's breast, if there was no ground to impute to him any motive injurious to the health or liberty of the child (*c*). This right of the father at common law will not be interfered with, unless it is shown to be essential for the safety and welfare of the children (*d*). The duration of this absolute right of the father is up to the age of fourteen (*e*), though with daughters it continues longer (*f*). And though the father agree to leave the child with a third party, he is entitled at any time to withdraw his consent (*g*).

Mother's right of access to

Till lately the want of decisions in Scotland left in doubt a

(*a*) *Invergelly* v. *her Husband*, M. 5944 (1708); and see the general principles of this section in Craig ii. 21, 16; ii. 20, 7; ii. 20, 29; Stair i. 5, 3; Bankt. i. 6, 1; Ersk. i. 6, 53 and 56.

(*b*) *Cartlidge* v. *Cartlidge*, 1862, 2 S. and T. 567, 31 L. J. Mat. Cas. 85, 10 W. R. 672, 6 L. T. N. S. 397. *Barford, ex parte*, 1860, 9 W. R. 99, 8 Cox C. C. 405, 3 L. T. N. S. 467 S. C.; *Reg.* v. *Howes*, 7 Jur. N. S. 22; *Hyde* v. *Hyde*, 1859, 29 L. J. Mat. Cas. 150; *Hakewill, in re*, 1852, 12 C. B. 223; *Pulbrook, in re*, 1847, 11 Jur. 185. See the authorities collected, 49 Law Mag. 373; M'Pherson on Infants, p. 61; 1 Blackst. Com. 452; Chambers on Infancy, pp. 86–7.

(*c*) *Rex* v. *De Manneville*, 1804, 5 East. 221, 1 Smith 358. But see *Rex* v. *Wilson*, 1829, 4 Ad. and Ell. 645, where an infant child in custody of the mother was ordered to remain with her, the father's access to be regulated by the Master.

(*d*) *Fynn, in re*, 1848, 2 De G. and S. 457, 12 Jur. 713, 13 Jur. 483; *Anon.* 1851, 2 Sim. N. S. 54; *ex parte M'Lellan*, 1831, 1 Dowl. P. C. 81; *Curtis* v. *Curtis*, 1858, 5 Jur. N. S. 1147, 28 L. J. Chan. 458, 7 W. R. 474.

(*e*) *Hyde* v. *Hyde, supra; Marsh* v. *Marsh*, 1858, 28 L. J. Mat. Cas. 13; *Rex* v. *Greenhill*, 1836, 6 Nev. and M. 244, 4 Ad. and E. 624.

(*f*) *Cartlidge* v. *Cartlidge, supra.*

(*g*) *Reg.* v. *Smith*, 1853, 1 B. C. C. 132, 17 Jur. 24, 22 L. J. Q. B. 116. But see *Preston, ex parte*, 1847, 5 D. and L. 233, 2 B. C. Rep. 169, 11 Jur. 1039, where, on the application of a parent residing in India, the Court refused to grant *habeas corpus* for the removal of a child from the custody of persons in this country, to whose care it had,

children in father's custody.

point which excited great attention in England, namely, whether the father could, in virtue of his right of custody of the child, prevent the mother having access to it, on his withdrawing from her society. The mere fact of his wrongous separation from the wife, and his gross violation of conjugal duties, does not, it was contended, affect his parental rights. It was decided in England, that a court could not deprive a father, though living in adultery, of the custody of his child, nor compel him to admit the mother to have access to her child, unless misconduct on his part was shown, with reference to its management and education (*a*). Afterwards, however, the Legislature interfered, and allowed the mother to see her children, on her making application to the Court of Chancery for that purpose. Under this statute (*b*) it has been held that the Court will not make an order to enable the mother to see her children, if she have left her husband without sufficient cause (*c*). This statute has introduced, as controlling the paternal right to the exclusive custody of his child, two considerations, viz. marital duty to be observed towards his wife, and due regard to the interests of the child; but if these two objects are attained consistently with the father's retaining the custody of the child, his common law right will not be interfered with (*d*). Further discretionary powers in regard to the regulation of the custody of children have been given to the courts of England by another statute (*e*); and it has been held that in exercising these, the Court will consider the interests of parents and children (*f*). These statutes are declared to apply only to England and Ireland.

with the approval of the parent, been for a long time committed.

(*a*) *Ball* v. *Ball*, 1827, 2 Sim. 35. But see *Wellesley* v. *Beaufort*, 1827, 2 Russ. 1, where a father living in adultery was alleged to be a person of very improper moral character, and the mother being deceased, guardians were appointed. See Chambers on Infancy, p. 86; M'Pherson on Infants, 150, 151, 164.

(*b*) 2 and 3 Vict. c. 54.

(*c*) *In re Taylor*, 1840, 11 Sim. 178.

(*d*) *In re Halliday*, 1852, 17 Jur. 56. See also *in re Tomlinson*, 1849, 3 De G. and S. 371, where the custody of a child of seven years of age was continued to the mother, though she lived separate from the husband, because she had a good defence against any action for restitution of conjugal rights.

(*e*) 20 and 21 Vict. c. 85, s. 35, regulating Divorce and Mat. Causes.

(*f*) *Cartlidge* v. *Cartlidge*, *supra*; *Suggate* v. *Suggate*, 1859, 1 S. and T. 489, 29 L. J. Mat. Cas. 167, 8 W. R. 20; *Shillito* v. *Collett*, 1860, 8 W. R. 683 and 696. But see *Witte*, *ex parte*, 1853, 13 C. B. 680.

The question thus settled by statutory authority in England has been recently determined in Scotland, it being declared that the common law of this country is the same as that fixed by statute in England. A husband having brought an action of divorce for adultery against his wife, in which he failed, she being by a majority of the judges assoilzied, refused her all access to her children, of whom the youngest was five and the eldest fifteen, on the ground that he still believed in her guilt. The Lord President (M'Neill) said: 'I think the husband is fundamentally wrong in the doctrine of law maintained by him, that he has an absolute and abstract power to prevent access by the mother to her children. I have found no authority to that effect.' His Lordship referred to the case of *Colquhoun* in 1804, referred to by the defender, and proceeded: 'But I see nothing to interfere with the proposition, that it is in the power of the Court, and within its discretion, in the peculiar circumstances of any case, so to regulate things, that the mother shall have access to the children in a convenient manner and under reasonable regulations. In a case referred to, decided in 1847, it was clearly laid down by all the judges, although they refused access in the circumstances of that case, that during the dependence of an accusation of adultery, the Court had the power to interfere, and that it was a matter of discretion for the Court to regulate the access to the children.' 'I think that, upon the whole, this is a case in which the Court ought to exercise the power, which it undoubtedly has, of giving access under such regulation as is prayed for.' Lord Ivory observed: 'It seems to me that the law of Scotland is very much like that which has latterly been made the law of England under the statute of 2 and 3 Vict. c. 54. In that country the Legislature is more afraid of regulations and enactments than ours has ever been in matters of this kind. But even there it was found necessary to remove by statute those impediments in the way of the Court doing justice to both parties, which it has been the happiness of this country never to have known.' And Lord Curriehill observed: 'Undoubtedly the power of the father in reference to the children is very great. But it is not arbitrary, nor beyond the control of this Court, and he is bound to exercise it according to a sound discretion, and with reference to the rights of the mother; and I think it is her right, unless there

is something in her conduct or circumstances which deprive her of it, to have reasonable access to her own children. The law upon this subject appears to me to be well stated—and also its qualification—in that case referred to by your Lordship, which was decided by the Second Division on 10th December 1847. The rights of the father are there put very high, no doubt, but not higher than what the law of Scotland gives him; but they are subject to the qualification stated by your Lordship, that the mother, unless there is something in the circumstances of the case to deprive her of it, is entitled to access to her children' (*a*). The judgment of the Court was: 'Find that, in the circumstances, the respondent is not entitled to refuse to the petitioner all access to her children; but before answer as to the mode and extent of such access, and the conditions and limitations under which the same ought to be sanctioned and allowed, appoint the parties respectively to state in short minutes without argument what they have to suggest with reference to the extent and regulation of such access.' The access was afterwards, under a private arrangement, regulated thus: 'The children shall be sent to Edinburgh twice a year, and remain eight hours consecutively with Mrs M'Iver, no other person being present, but A. B. (a neutral party named); the first visit to take place betwixt the present time and day of August next, and the next within six months thereafter, and so forth, Mrs M'Iver to receive six days' notice of the time and place of meeting, either party being entitled to resile from this arrangement on three months' notice.'

The case referred to in the above speeches was decided in the Second Division on 10th December 1847 (*b*). It was an incidental application by a mother, pending an action of divorce against her on the ground of adultery, for reasonable access to her children. The Court entertained the action as undoubtedly competent, and to be considered on its merits; but they held that until the accusation against the wife was disposed of, it was not expedient to interfere with the husband's paternal right of custody of the children. Lord Moncreiff observed: 'It seems to be agreed on all hands that this is a matter that lies in the discretion of the Court; and the question is, Are there here any circumstances to lead us to exercise that

(*a*) *M'Iver* v. *M'Iver*, 2 July 1859, 21 D. 1103.

(*b*) *A. B.* v. *C. D.*, 10 Dec. 1847, 10 D. 229.

discretion by interfering with what is the established right of the husband by the law of Scotland? He unquestionably has right to regulate all matters connected with his children. It is true that we are not to presume guilt against this lady; but that is not sufficient to warrant our interposition. There might be circumstances in the course of the suit, such as undue delay on the part of the husband, which might render it proper for us to interpose, but none have as yet been stated to us.' And Lord Cockburn says: 'There is no doubt that the Court have the power to order this matter. The father's general power to have the custody of the child is quite certain; and the question is, Are there any circumstances to lead us to interfere with it?' In the case of *M'Farlane* (*a*), a few months previous to that last referred to, the application was at the instance of a father for restitution of his children—a girl aged eight, and a boy aged three years—who were in the custody of their mother, at whose instance an action of separation on the ground of cruelty was pending; and the Court ordered the girl to be restored to him, but left the boy *hoc statu* in the charge of the mother, the law being thus stated by Lord Jeffrey: 'In the exercise of the discretionary power committed to the Court, I think your Lordships have taken the sound view of the case. We are not entitled to take children from a father, merely because they would be better taken care of by other relatives willing to keep them. Unless the health or morals of the child be affected by allowing its father to have the custody, we must just submit to that general rule which delivers his child to him.'

Chastisement, aliment, etc., by parents of their children.

Parental authority implies a power on the father's part to punish his child, in so far as it may be necessary to do so, for obtaining the end which that authority has in view. But this end, while it sanctions, also limits the right. The chastisement must therefore be such as is conducive to the well-being of the child, and corrective of its faults. It must be moderate in amount. 'Parents,' says Grotius, 'have a right not to govern only, but to punish, and to enforce obedience from their children, so far forth, as they ought to be either compelled to their duty, or to reform what is amiss' (*b*).

Parent to teach child a trade.

The parent's duty also extends to the providing the child with a

(*a*) *M'Farlane* v. *M'Farlane*, 9 March 1847, 9 D. 904.

(*b*) Bankt. i. 6, 1; Ersk. i. 6, 53; Grotius ii. 5, 4; Stair i. 5, 6.

profession or trade, along with a suitable education. How far this duty can be enforced by a court of law, will be considered hereafter.

Father entitled to child's earnings.

It is a legitimate exercise of parental authority to compel the child to labour for his subsistence (*a*). As a recompense to him for the aliment and education he gives his child, but not as a consequence from the principle of parental authority, the father is entitled to claim all the earnings of a child during his childhood, or as much of them at least as may be considered a sufficient equivalent (*b*). But a property possessed by the child, from which large profits are drawn, disproportionate to the expense of maintenance and education, will be saved for himself, and a fair sum awarded to the father in name of board (*c*). On similar principles, a father is not bound to account for interest received on a child's money in his hands (*d*); but if the interest greatly exceeded any reasonable claim which he could make for board and education, he would be liable to account (*e*). A father may maintain an action of damages for maltreating or killing a child (*f*).

Powers of father after divorce.

Here the general rule of law, that the father is the legal custodier of the children, holds, even when he is the guilty party; for although he has broken the vow of conjugal fidelity to his wife, it does not follow that he will also wrongously discharge his parental duties to his children (*g*). In England, notwithstanding *Ball's* case, already referred to, the innocent party is now usually preferred to the custody of the children (*h*). And this holds even where the

(*a*) Stair i. 5, 6 and 8; Bankt. i. 6, 1; Ersk. i. 6, 53.

(*b*) Stair i. 5, 8, and i. 5, 6; Bankt. i. 6, 1 and 8; and Ersk. i. 6, 53.

(*c*) *Infra*. How the obligation of aliment ceases, No. 2.

(*d*) *Vance*, 1736, M. 549; *Menzies* v. *Livingstone*, 27 Feb. 1839, 1 D. 601.

(*e*) More's Lectures, i. p. 87; also *Steele* v. *Cooper*, 15 June 1830, 8 S. 926.

(*f*) *M'Kenzie* v. *M'Kenzie*, 6 March 1788, not reported. Hume, Session Pap. vol. 'Winter 1788,' vol. iv. of that year. *Findlater* v. *Duncan*, 18 July 1837, 15 S. 1304; 19 June 1838, 16 S. 1150; reversed on another point, 23 Aug. 1839, Macl. and Rob. 911. See also *Milne* v. *Thomson*, 6 July 1841, 3 D. 1163. In *Weems* v. *Matheson's Representatives*, H. L., 31 May 1861, 4 Macq. 216, it was held that a widow, who was supported by her son, had a good claim of damages against his employers, through whose carelessness he met his death, the *ratio* being that he was bound to support her.

(*g*) See Fraser, Pers. and Dom. Rel. vol. i. p. 466; *per* Lord Meadowbank in *Greenhill* v. *Ford*, 2 Sh. App. Ca. 435 (1824); Wal. 231; Ferg. Cons. Law, p. 196.

(*h*) *Boynton* v. *Boynton*, 1861, 2 S. and T. 275, 30 L. J. Mat. Cas. 156, 9 W. R. 620, 4 L. T. N. S. 258; *Suggate* v. *Suggate*, 1859, 29 L. J. Mat. Cas. 167; *Martin* v. *Martin*, 1860, 29 L. J. Mat. Cas. 106, 8 W. R. 367.

divorce is on the ground of the father's cruelty; the Court, under the discretionary powers conferred by 20 and 21 Vict. c. 85, s. 35, leaving the children with the mother, if that appears the best course (*a*). In a case in Scotland with regard to the demand of the mother after the father's death for the custody of her child, it appeared that she had been divorced for adultery, and had thereafter continued the illicit connection. Her child having been committed by herself to a third person of good character, before her divorce, and the custodier refusing to give it up, the mother applied to the Court for an order to have it delivered to her. The Court refused the petition, on the ground that her conduct disqualified her for having any control over the child; at the same time expressing an opinion, that the circumstance of the divorce did not change the relationship between the parties, or the duties and obligations which flow from it (*b*). The same principle which ruled this case was recently applied to the case of a father after divorce. This was the case of *Harvey* (*c*) already referred to. The father had been divorced on account of adultery committed with his wife's sister, being thus guilty of the crime of incest. The children, a boy and girl, who at the time of the application were respectively fifteen and fourteen years of age, had remained after the divorce in the custody of their mother, and after her second marriage in that of her relations for the period of twelve years. The father had gone to Australia, but had subsequently to the divorce proposed first to his wife to be remarried to her, and then to his wife's sister, with whom the adultery was committed, to marry her; and his letters showed that he was not a proper person to entrust the children to. A *curator ad litem* was appointed to the children, who had personal communication with them, and stated to the Court that of their own free will they were desirous to have no communication with their father, being resolved to resist his attempts to see them. The Court unanimously refused the father's petition. The Lord Justice-Clerk, in delivering the opinion of the Court, said: 'It is not denied that for the last twelve years, since their father's divorce, the children have been brought

(*a*) *Marsh* v. *Marsh*, 1858, 28 L. J. Mat. Cas. 13. The children were appointed to remain with the mother till fourteen, when they were to exercise their own choice.

(*b*) *Kennedy* v. *Steele*, 16 Nov. 1841, 4 D. 12.

(*c*) *Harvey* v. *Harvey*, 15 June 1860, 22 D. 1198, *supra*, p. 65.

up with the most affectionate care, and that in their present situation they are furnished with every comfort, and with an education befitting their station. On the other hand, their father, who demands their restoration to his custody, and subjection to his authority, has been guilty of the capital crime of incest. This is a great family crime, which necessarily makes him an outlaw from that family which he has so grievously injured, and is sufficient to justify any measures which the Court may think necessary for the protection of the children, however much they may trench upon the legal authority of the father. With this guilt attaching to him, and apparently, from his conduct and letters, unconscious of the enormity, and incapable of understanding the true nature of the crime, he is the most unfitting and unsafe person that could well be found for the guardianship and control of a boy and girl of fifteen and fourteen years of age. The petitioner, therefore, is in our opinion personally disqualified for the exercise of the right, and the performance of the duty of a father to his minor children. But the claim, if it could have been otherwise supported, is materially weakened, if indeed his right be not altogether lost, by his abandonment of his children to the care of others for a period of twelve years, during which he has neither exercised his paternal authority, nor contributed anything to their maintenance and education. When to all this is added the strong and unbiassed expression of feeling on the part of the children themselves against intercourse with their father, the Court have no difficulty in refusing the petitioner's demand.'

By a recent statute (*a*) it has been provided, that 'in any action for separation *a mensâ et thoro*, or for divorce, the Court may from time to time make such interim orders, and may in the final decree make such provision as to it shall seem just and proper, with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates.' There have been no decisions of the Inner House as to this section; but the practice of the Lords Ordinary is to award the custody to the innocent husband or wife.

Termination of parental authority.

III. The parental authority ceases, by the father's express or tacit consent to that effect: tacitly by allowing the child to commence business for himself, or to set up a separate establishment (*b*). This

(*a*) 24 and 25 Vict. c. 86, s. 9, the Conjugal Rights (Scotland) Act, 1861.

(*b*) Stair i. 5, 6; Bankt. i. 6, 1 and 8; Ersk. i. 6, 53.

doctrine assumes the correctness of what some lawyers have said, that children are subjected to the *patria potestas* till majority (*a*). After pupillarity, the father's authority is, however, allowed to be so much weakened that it may be easily lost, either by an apparent intention to abandon it, or by circumstances showing the father's inability or unwillingness to discharge its duties (*b*). It terminates also by a child's marriage (*c*), especially by that of a daughter, who thereby passes under the authority of her husband (*d*). A child is not held to be forisfamiliated, though he should reside out of his father's house, if he earns not his livelihood by his own industry, independently of any aid from the father (*e*). A lad having married when he was an apprentice, earning eight shillings a week, and residing out of his father's house, was held not to be forisfamiliated. This, said Lord Gillies, 'did not prove his forisfamiliation, but his folly' (*f*). He would not be forisfamiliated though he carried on his father's business (*g*). A father may, by agreement, resign his paternal power of guardianship to the mother, or any other party not disqualified (*h*). But in England, children have been ordered to be delivered up by their mother to their father on *habeas corpus*, notwithstanding provisions contained in deeds of separation for their residing with their mother (*i*). The father is also held in England to be entitled at any time to withdraw a consent which he has given to his child being placed under the care of a third party (*k*). In one case, however, the Court refused to grant *habeas corpus* on the application of a parent residing in India, for the purpose of removing a child from the custody of persons in this country, to whose care it had, with the approbation of the parents, been for a long time committed (*l*).

(*a*) *Supra*, p. 65.

(*b*) *Per* Lord Justice-Clerk in *Harvey* v. *Harvey*, *supra*, p. 65.

(*c*) Stair, *ibid.*; Bayne's Notes, p. 27; Ersk. Prin. i. 7, 36; Inst. i. 6, 53.

(*d*) Stair, *ibid.*; Ersk. i. 6, 56; Bell's Dict. *v.* Father.

(*e*) Ersk. i. 6, 55; *Mackenzie* v. *Fairholm* (1666), M. 8959; Fraser, Pers. and Dom. Rel. vol. i. p. 556.

(*f*) *Anderson* v. *Cation or Anderson*, 15 Nov. 1832, 11 S. 10, 5 Jurist 94.

(*g*) *M'Michael* v. *Barbour*, 17 Dec. 1840, 3 D. 279.

(*h*) *Infra*, Guardian and Ward, Div. i. c. ii. s. 3.

(*i*) *Westmeath* v. *Westmeath*, Jac. 251, 252, note; M'Pherson 155, and 553–4.

(*k*) *Reg.* v. *Smith*, 1853, 1 B. C. C. 132, 17 Jur. 24, 22 L. J. Q. B. 116.

(*l*) *Preston, ex parte*, 1847, 5 D. and L. 233, 2 B. C. Rep. 169, 11 Jur. 1039.

Right of a court of law to control the father.

IV. The powers of the father over his child must be taken under this limitation, that they are subject to the superintending control of the Supreme Court of Equity of the country. 'Applications of this nature are fortunately of rare occurrence, and when they do occur they demand the most anxious consideration; for the Court has never so delicate a duty to perform as when called upon to interfere with the domestic relations, and to regulate or enforce the rights and duties founded on these relations' (*a*). This part of the duty of the Court is indeed of all others the most delicate, as there is no definite line to point out the precise point where the powers of a parent terminate, or to settle the morality or immorality of particular modes of instruction. Where, however, the Court of Session, as the Supreme Court of Equity in this country, is satisfied that the government of a father is vicious or immoral, or calculated to engender irreligious or atheistical opinions, or that the treatment of the child is cruel, harsh, and oppressive, they have an undoubted jurisdiction to interfere for the benefit of the child. Blackstone assumes it as undeniable, that in every civilised state such superintending power must exist; and if not vested in a court of law, is to be found in the Crown (*b*). The paternal authority, as to its civil force, is founded in nature, and the care which it is presumed the parent would take for the education of his child; but if he should educate him in a manner forbidden by the laws of the State, the public right of the community to superintend the education of its members, and to disallow what, for its own security and welfare, it should see fit to disallow, goes beyond the right and authority of the father (*c*). The law imposes a duty upon parents, and in general gives them credit for ability and inclination to execute it; but that presumption, like all others, would fail in particular instances; and if an instance occurred in which a father was unable or unwilling to execute that duty, and further, was actively proceeding against it, of necessity the State must place somewhere a superintending power over those who cannot take care of themselves, and have not the benefit of that care, which is, in general, presumed to be effectual (*d*). This superintending power

(*a*) *Per* Ld. Justice-Cl. in *Harvey, sup.*
(*b*) Com. iii. 436.
(*c*) *Blisset's* case, 1774, Lofft 748, n.
(*d*) *Per* Lord Eldon in *De Manneville* v. *De Manneville* (1804), 10 Ves. 64.

is in England placed in the Court of Chancery, which represents the king as *parens patriæ*, and has jurisdiction to control the father's right of custody (*a*). In Scotland this power was formerly exercised by the Scotch Privy Council, who claimed the right of superintending the morals and education of the community; and the manuscript records of that tribunal, preserved in the library of the Faculty of Advocates, contain several notices of their exercise of this jurisdiction. 'Scott of Raeburn and his wife being infected with the error of Quakerism,' had their children taken from them (*b*). So on 3d October 1665, the Privy Council took the young Marquis of Huntly from the custody of his mother and his guardians, 'they being popishly inclined; and ordanes him to be educat in the family of the Lord Archbishop of St Andrews (Sharp), to whose tender care they recommend him, and that no person popishly inclined have liberty to serve or attend him.' This right to control the parental authority was afterwards expressly assumed by the Court of Session (*c*), and has been ever since exercised without dispute by that Court. And where strong allegations are made as to the improper conduct of the father, the Court will make *interim* regulations for the custody of the children on the case coming into Court (*d*).

What circumstances would induce the Court to remove the children from the father.

In England, the jurisdiction has been exercised only in cases marked by the broadest features of immorality and irreligion. It has been applied, *first*, in the case of a father outlawed in a foreign country, bankrupt in fortune, and vicious in character; *secondly*, where the father was in Newgate for breach of the peace against his own wife; *thirdly*, in a case where the father was an habitual drunkard and blasphemer; *fourthly*, where the father was an avowed atheist, having published a book denying the existence of a God, and denying the institution of marriage, and acting up to his principles, by deserting his wife and living in adultery; *fifthly*, in

(*a*) *Ex parte Warner*, 1792, 4 Bro. C. C. 101; *ex parte Skinner*, 1824, 9 Moore 278; *De Manneville*, *supra*; *Whitfield* v. *Hales*, 1806, 12 Ves. p. 492.

(*b*) See MSS. Records Adv. Lib. of date 20 June 1665. See another order as to the Viscount of Oxford, 7 Feb. 1667. The disability on Roman Catholic fathers, Ersk. i. 7, 12, appears now to be repealed, 10 Geo. IV. c. 7, s. 10.

(*c*) *Baillie* v. *Agnew*, 5 Sup. 526 (1775). See Ersk. i. 6, 56.

(*d*) *Cameron*, 1 July 1847, 9 D. 1401.

the case of a father ruined by a most incredible prodigality, living in adultery, and inculcating immoral lessons on his children (*a*). The Court will not interfere when it is merely shown that it will be for the benefit of the child to remove it from the custody of the parent (*b*).

In Scotland, the first reported case upon this subject was one where Sir Stair Agnew of Lochnaw, the father, had contracted unusual habits of drinking, and proceeded to high acts of ferocity and maltreatment to his children (*c*). In another case, on the averment of the father's 'adultery and grossly immoral conduct,' the Court sequestrated the children, and granted interim interdict against the father removing them from the mother's custody (*d*). In the case of *Cameron*, the Court interfered on the application of the mother, where the father had squandered his means, dissipated the funds of the marriage trust, was of intemperate habits, guilty of great cruelty towards his wife and family, and guilty also of adultery (*e*). A clear ground for interfering with the father's power, is his cruelty to the children (*f*). In England it has been decided, that if the father will not aliment them, he is not entitled to the custody (*g*). But it is no ground for the removal of the children from the father, that the latter is insolvent, if his character be good (*h*).

It is more doubtful whether the Court would interfere to remove the children from the father, where he is guilty of no positive wrong, but merely abstains from the discharge of a duty incumbent

(*a*) Shelford on Marriage, p. 685; Chambers on Infancy, pp. 250 *seq.*; M'Pherson on Infants, p. 142, in which works the whole of the English cases on the subject will be found digested. See particularly *S. P. Wellesley* v. *Beaufort*, 1827, 2 Russ. 1; *Lyons* v. *Blenkin*, 1821, Jacob 245; *Creuze* v. *Hunter*, 1790, 2 Cox 242; *Wellesley* v. *Wellesley*, 1828, 2 Bligh N. S. 132; *ex parte Bailey*, 1838, 6 Dowl. P. C. 311, where the father was convicted of felony; and *Warde* v. *Warde*, 1849, 2 Ph. 786, and *Thomas* v. *Roberts*, 1850, 3 De G. and S. 758, 14 Jur. 639, 19 L. J. Chan. 506, where the father's religious views were of a most erroneous character.

(*b*) *Curtis* v. *Curtis*, 1859, 5 Jur. N. S. 1147, 28 L. J. Chan. 458, 7 W. R. 474.

(*c*) *Baillie* v. *Agnew*, *supra*, p. 78.

(*d*) *Craig* or *Thomson*, 27 May 1829, 1 Jur. 201.

(*e*) *Cameron*, petr., 1 July 1847, 9 D. 1401.

(*f*) See *Baillie*, *supra*; *Whitfield* v. *Hales*, 12 Ves. 492. See Chambers on Infancy, p. 173, and cases there cited.

(*g*) Chambers, p. 177.

(*h*) *Kirkpatrick* v. *Kirkpatrick*, quoted by M'Pherson on Infants, p. 143, and Chambers on Infancy, p. 365.

on him not absolutely necessary for the child's support. Where, for example, he gives it no education or trade, some lawyers hold that he may be compelled to do so according to his ability and rank (*a*), while others regard this as one of those duties which the civil law cannot enforce, and the non-implement of which therefore would form no ground for removing the child from the custody of its father (*b*). In one case, 'it occurred to the Court, that the *patria potestas* is such, that a peer may breed his son a cobbler, and after putting him in business with a competent stock is relieved from all further aliment' (*c*); and the language of Lord Kenyon as to the law of England is, that 'a father was bound by every social tie to give his children an education suitable to their rank; but it was a duty of imperfect obligation, and could not be enforced by a court of law. The richest man in the kingdom might say to his heir-apparent, "Go and earn your daily bread by your daily labour," and the law could not interfere. There is no further obligation than that which nature has implanted in his breast. The law obliged him to nothing but nurture' (*d*).

Courts will compel tutors to educate children.

But the rule is entirely different after the father's death, and when the child is in the hands of tutors. The Court, in such circumstances, will interfere to compel the tutors to educate the child in a manner that will be suitable to the rank and status and property he will enjoy on arriving at manhood (*e*). There is also an exception to the rule, with regard to the case where the education is taken out of the father's hands by a third party having left property to the child, under the condition that he shall be educated and brought up in a particular mode (*f*). Indeed, it may be doubted if the courts would allow a father in any case to educate in a mean way, or bind to a low trade, a child entitled to large property in his own right, and wholly independent of the father. In England, the courts would in such circumstances compel a suitable education (*g*).

(*a*) Spottiswoode, note to M'Ken. Inst. i. 7, 23; Wall. p. 278; Ersk. i. 6, 56.

(*b*) More's Notes, p. xxxi. s. 11; Kames' Equity, p. 80; Bell's Prin. 1635.

(*c*) *Scot* v. *Sharp*, 1759, M. App. *v.* Parent and Child 1.

(*d*) *Hodges* v. *Hodges*, Peake's Addl. Ca. 79.

(*e*) See *infra*, Guardian and Ward *v.* Aliment and Education of Pupil.

(*f*) See *Charteris* v. *The Officers of State* (1749), 5 Sup. 771; Elch. *v.* Tutors, No. 22; M. 7283; 1 Paton 463.

(*g*) Anon. Jac. n. 255, and 254, n. See M'Pherson on Infants, 135, where

Who may apply to the Court for the child's protection.

The right to apply to the Court for the protection of a child whose education is neglected, or wrongly directed, or who is cruelly abused by its parents, unquestionably belongs to any of its relations (*a*). It does not appear, however, that the same right is competent to strangers, or to the Lord Advocate acting for the Crown as *parens patriæ* (*b*).

The Court to which application should in Scotland be made is the Court of Session, as the Supreme Court of Equity of the country. The Sheriff has no power to deal with the matter of *permanent* custody; but in cases of emergency, the judge ordinary of the bounds can, on a summary petition, regulate the interim custody of the children,—a jurisdiction which is often asserted (*c*).

the English cases are digested. A curious point was raised in a Sheriff Court case, the person employed by the father to instruct his children having after his death brought a direct claim against the children for his fee; but the action was dismissed, as his claim against them could only be found in their representing their father, which they did not.—*Adams* v. *Keith*, 9 May 1856 (Perth), 1 Shf. Ct. Dec. 190.

(*a*) *Bailie* v. *Agnew*, *ut supra*, p. 78; *Kennedy* v. *Steele*, 16 Nov. 1841, 4 D. 12, *per* Lord Mackenzie.

(*b*) See *dicta* in *Bryce* v. *Graham*, 25 Jan. 1828, 6 S. 425, as to powers of Lord Advocate.

(*c*) This matter was very fully considered in a case in the Sheriff Court of Perth. This was the case of *Sharp* v. *Jack*, 10 June 1861, Scot. Law Journal iii. 78, in which a putative father sued the mother of his bastard child and her husband for the custody of the child. The Sheriff (Gordon), overruling the judgment of the Sheriff-substitute (Barclay), found that he had no jurisdiction to entertain the question. The grounds on which he placed his judgment were, that the legal right of custody was in the mother; and that, while the Sheriff might interfere in a case of emergency, by giving temporary orders as to the custody, he had no jurisdiction permanently to consider any application asking him to interfere with the mother's legal right. This has been followed by *Rankine* v. *Ferguson*, 4 Aug. 1864, Shf. Co. Glasgow, Scot. Law Magazine, N. S. iii. p. 132. In a case, p. 143 of same volume, in the Sheriff Court of Perth, Sheriff Gordon sustained the right of a mother to demand the custody of her child, on the ground that the Sheriff had jurisdiction to support the legal title of the mother to the custody of her bastard child, and that any order necessary for that purpose might competently be granted by him.—*Herd* v. *Ellis*, 20 Aug. 1864, Scot. Law Magazine, N. S. iii. 143.

As regards the Sheriff's right to give interim regulations in cases of emergency, the following cases may be referred to. In *Goadby* v. *Macandys*, 7 July 1815, F. C., a mother applied for restitution of her child from a relation to whom she had sent him for the benefit of his health. The Sheriff entertained the application, and gave effect to it, because 'by the law of Scotland the care of the person

In England, the Court will entertain a complaint from a stranger, as *amicus curiæ*, as to the abuse of a child (*a*).

Right of the father to direct the education of his children after his death.

V. The right of a father to direct the training and education of his children after his death, has not been much questioned in Scotland. Questions of this kind have in England usually arisen, where the father and mother were of different religious persuasions. And it has been held that a father may direct by his will the religious training of his children. But if, being a Roman Catholic, he has during his life permitted the mother to train them up as Protestants, he is held to have relinquished the right of direction (*b*).

Powers of the mother.

VI. Although the mother is entitled to reverence and obedience from her children, she has no power over them like the father. The mother's right to the custody of illegitimate children, with its limitations, will be noticed afterwards (*c*). During her husband's life and sanity, she has no right to the custody, nor can she interfere with their education. If the husband, however, become insane,

of the boy devolved on the mother;' and on advocation, the Court decided, after full argument, in her favour, and no doubt appears to have been expressed of the competency of the Sheriff's giving such interim order. In *Speid* v. *Webster*, 18 Dec. 1821, 1 S. 221, a mother had clandestinely removed her child from a boarding school, where she had been placed with her approbation; and the Sheriff, on application by the trustees who managed the property left to the child, ordered her to replace the child at the school, 'till parties shall be heard on their claims to the custody.' On an application by the mother for the custody of the child, the Sheriff refused to interfere, as it appeared more appropriate to the Court of Session; and the case was subsequently disposed of in the Court of Session, without any reference to the proceedings in the Sheriff Court. In the case of *Harvey*, 24 July 1850, the Sheriff of Aberdeenshire was stated to have refused an application made to him for the custody of a child by the father, on the ground of want of jurisdiction; and the Lord Justice-Clerk Inglis observed: 'This may probably be a well-founded observation.'—*Harvey* v. *Harvey*, 22 D. 1209. The authority of Wallace may be cited as confirming the limited jurisdiction of the Sheriff stated in the text. 'It is plain,' he says, 'from the nature of the thing, that all applications of this kind may be made, not only to the Lords of Session, but to every magistrate who can redress the wrong, summarily by petition and complaint.'—Wallace, p. 283.

(*a*) *Per* Lord Hardwicke, 2 Ves. 472; Chambers on Infancy, p. 21.

(*b*) *Hill* v. *Hill*, 1862, 8 Jur. N. S. 609, 31 L. J. Chan. 505, 10 W. R. 400, 6 L. T. N. S. 99; *Davis* v. *Davis*, 1862, 10 W. R. 245; *Stourton* v. *Stourton*, 1857, 3 Jur. N. S. 527, 26 L. J. Chan. 354; *Talbot* v. *E. Shrewsbury*, 1840, 4 Jur. 380.

(*c*) See the decisions as to bastard children, *infra*, chap. v.

the wife will be preferred to the custody of the children over the husband's relations. This was settled in a recent case, where the husband and wife had separated, and the children were in custody of the father. He became insane, and his brother took charge of the children, who were of the ages of eight and ten; but the wife was preferred to the custody, on condition of keeping the children in Scotland (*a*). The Lord Justice-Clerk (Hope) observed: 'The parties are separated, and as to the cause of separation we have no ground for saying that the wife is more to blame than the husband. The husband has by the hand of God been reduced to a state in which he is unfit to be trusted with the care of his children, and he is confined in an asylum. There is not the very slightest reproach attaching to the moral character of the mother, and there is no statement of any temper having been ever shown to the children. On what grounds then can we refuse complying with the prayer of this petition?' Pending processes of separation or divorce, the Court regulate the custody according to what seems best for the child; and if the child be very young, they will not, as a matter of course, give effect to the husband's right of custody (*b*). On the father's death, the most of these powers are transferred to tutors, unless the children be very young (*c*). In one case it was laid down as a rule that a mother is entitled to the custody of children under seven years of age, in preference to tutors nominate, they, however, superintending the education (*d*). But in the anonymous case cited above, the children were aged eight and ten; and in another case, warrant was granted to a mother to obtain the custody of her daughter—eleven years of age—by a former marriage, who then resided with her paternal aunt (*e*). But the question, in both of these cases, was with the husband's relations, and not with tutors deriving authority from the father's nomination. If improper conduct on the part of the mother be alleged, the Court will interfere for the benefit of the child; and inasmuch as her right of custody is weaker than that of the father, they will have even less

(*a*) *A. B.* v. *C. D.*, 19 July 1850, 12 D. 1297.

(*b*) *Macfarlane* v. *Macfarlane*, 9 March 1847, 9 D. 904. See *supra*, p. 75.

(*c*) *Infra*, *v.* Guardian and Ward, Chapter on Custody of Pupils; Rutherforth's Natural Law, p. 150; Stair i. 6, 6; Wall. 283.

(*d*) *Dallas* v. *Dundas*, 20 Dec. 1845, 8 D. 318.

(*e*) *Johnston* v. *Otto*, 24 Feb. 1849, 11 D. 718.

hesitation in removing the children from her, if it appears that her house is not a proper one for them (*a*).

The mother has not so strong a claim to the custody of her children after her second marriage as during her viduity (*b*). The rule followed in recent decisions seems to be, that the Court will dispose of the custody according to the circumstances of each case. If nothing improper is alleged against the mother, especially if the children be very young, they will be left in her custody subject to regulated visits by the husband's relations (*c*). The mother is not entitled to remove her children from this country (*d*). The Court have frequently, in preferring her to the custody of her children, conditioned that she find caution not to remove them from the jurisdiction of the Court (*e*).

If the mother survive the father, she may acquire a settlement in a parish for her infant legitimate child, so as to entitle it to aliment from the parish (*f*). In England, it is held that on the father's death without appointing guardians, the mother is the proper guardian for nurture, and has right to the custody of children up to fourteen (*g*). If the father, however, has appointed guardians, she has no right of custody; but the Court may, as a matter of discretion, leave the children with her (*h*).

(*a*) *Kennedy* v. *Steele*, *supra*, p. 81; *Denny* v. *M'Nish*, 16 Jan. 1863, 1 Macph. 268.

(*b*) *Langshaw* v. *Muir* (1629), M. 16252; *Finnie* v. *Oliphant* (1631), M. 393 and 406.

(*c*) *Johnston* v. *Otto*, *supra*; *M'Callum and Others* v. *M'Donald and Husband*, 10 March 1853, 15 D. 535, where the child was five years old.

(*d*) *Buchan* v. *Cardross*, *infra*. Lady Cardross, having, notwithstanding the interdict, taken the children to England, subsequently raised an action for aliment against Lord Buchan, her father-in-law; but the Court, on account of her breach of the interdict, refused to listen to the claim.—*Lady Cardross* v. *E. Buchan*, 17 Dec. 1842, 5 D. 343.

(*e*) *E. Buchan* v. *Lady Cardross*, 27 May 1842, 4 D. 1268; *M'Callum* v. *M'Donald*, *supra*; *A. B.* v. *C. D.*, 12 D. 1297. See also *Wm. Paul*, petr., 8 March 1838, 16 S. 822, where the pupil, having been unwarrantably removed by the mother from this country, the Court, on the application of the factor *loco tutoris*, granted warrant to messengers-at-arms 'to take his person into their custody wherever he can be found, and convey and deliver him into the custody of ——,' a person named in the petition.

(*f*) *Heritors of Coldingham* v. *Dunse*, M. 10582, 5 Sup. 539 (1779); *Heritors of Crieff* v. *Heritors of Fowlis Wester*, 19 July 1842, 4 D. 1538.

(*g*) *Moore*, *in re*, 1859, 11 Ir. Com. Law Rep. 1 Q. B.; *Reg.* v. *Clarke*, 1857, 7 El. and Bl. 186, 3 Jur. N. S. 335, 26 L. J. Q. B. 169.

(*h*) *Talbot* v. *E. Shrewsbury*, 1840, 4 Jur. 380.

SECTION II.

OBLIGATION OF PARENTS TO ALIMENT CHILDREN.

By the law of nature 'written on the heart' (*a*), parents are bound to aliment, nourish, and support their children. The law of Scotland enforces this obligation, which does not depend upon any presumed contract or arrangement of parties, but is one of the provisions of nature, antecedent to all private compacts and to all written laws (*b*). The refusal of a husband or father to aliment a wife or child, is by the Poor Law Amendment Act (*c*) made a crime punishable by fine and imprisonment.

A claim of aliment may be founded either on this natural obligation, and it is then said to spring *ex debito naturali;* or it may be founded, not on any natural obligation lying on the person against whom it is made, but on the circumstance of his having inherited a succession from one deceased, against whom, if in life, the claimant would have had a good claim *ex debito naturali;* and it is then said to spring *ex jure representationis.*

Where the obligation springs *ex debito naturali.*

I. This obligation cannot be said to be universal on the one hand; and its application is not confined to the immediate relationship of parent and child on the other. In these circumstances, it will be proper to state, under distinct heads, the order of liability of obligants in suits for aliment, in order to show the qualifications and modifications of the general principle. It is to be observed, that not only must each class of obligants be exhausted before the immediately succeeding class of obligants can be made liable, but that it must also be shown that there is no one who represents any member of the first class, and who would on that account be liable *ex jure representationis* (*d*).

Order of liability of relations for aliment.

1. The persons first liable to maintain an indigent relation, are his or her own descendants; the nearer prior to the more remote. Thus the obligation of a father or mother is postponed to that of a

(*a*) Stair i. 5, 1 and 6.

(*b*) Stair i. 5, 7; Ersk. i. 6, 56; More's Lectures, i. p. 82.

(*c*) 8 and 9 Vict. c. 83, s. 80.

(*d*) *Bisset* (1748), M. 413, and Elch. Aliment 11; *Douglass* (1739), M. 425, and Elch. Aliment 9. See *infra*, p. 88.

child of the claimant, and it can only be enforced against them when the child is unable to discharge it (*a*). 2. In the event of the party's descendants being unable to aliment him, the obligation then falls upon the father, as being the nearest ascendant (*b*). 3. Failing the father by death or incapacity, or otherwise, the mother is *next* liable (*c*). The obligation on both father and mother springs naturally from the parental relationship, and the responsibility which is incurred by those who are instrumental in bringing a human being into the world. This doctrine as to the order of her liability has been denied by Erskine in his Institutes, where he lays it down, that the mother is only liable after all the paternal ascendants (grandfather, great-grandfather, etc.) have been discussed (*d*); but in this he is opposed to the doctrine of Bankton (*e*), and to that laid down in his own Principles (*f*), and to the rule sanctioned by other authorities (*g*), who all concur in holding that the mother is liable after the father. A stepmother is not liable *super jure naturæ* to aliment a stepson (*h*). The Lord President (Boyle) observed: 'I am clearly of opinion that there is no vestige of authority for the claim against the stepmother. No natural obligation exists: there is no connection between them; and whether or not she may give aliment from feelings of kindness, it is clear that the law cannot compel her.' The other judges were unanimously of the same opinion. In the older case of *Ayton* v. *Colville* (*i*), where a step-

(*a*) Dunlop's Parochial Law, p. 371, No. 38. See *Muirhead* v. *Muirhead*, 1 Feb. 1845. See Fraser, Pers. and Dom. Rel. i. p. 527.

(*b*) Stair i. 5, 7; Bankt. i. 6, 13; Ersk. i. 6, 56; and cases in this section.

(*c*) See for the general rule that a mother is bound to aliment a child, Stair i. 5, 7; Bankt. i. 6, 15; Ersk. i. 6, 56; *Buchan* v. *Buchan*, M. 411 (1666); *Scott* v. *Sharp* (1759), M. 440; *Kirkland* v. *Kirkland*, M. 403 (1685); *Macdonald* v. *Macdonald*, 20 June 1846, 8 D. 830. The case of *Maidment* v. *Landers*, 27 May 1818, 6 Dow 257, is not adverse to this. See it explained in *Drysdale* v. *Drysdale*, 30 June 1831, 3 Jur. 558; also in Ivory, note 185, to Ersk. i. 6, 56.

(*d*) Ersk. Inst. i. 6, 56. See also Wal. p. 275. But see Ersk. i. 6, 57 *ad fin.*

(*e*) Bankt. i. 6, 15.

(*f*) Ersk. Prin. iii. 1, 4.

(*g*) See *Douglas* v. *Douglas*, M. 425, and Elch. *v.* Aliment 9, and notes (1739), where a doctrine contrary to that of Erskine is assumed as law. See also *Hamilton*, 1629, M. 392; *Hay* (1729), M. 393; *Whiteford* v. *Laird of Lamington* (1675), M. 394; *Bissets* v. *their Brother*, M. 413, and Elch. *v.* Aliment 11 (1748). Dunlop, Paroch. Law, p. 370, No. 34. More's Notes, p. 29; Lectures, i. p. 83; Grotius ii. 7, 6.

(*h*) *Macdonald* v. *Macdonald*, 20 June 1846, 8 D. 830.

(*i*) 25 July 1705, M. 451. See also the case of *The Laird of Kirkland* v.

mother was made liable, she liferented the whole estate, and was therefore liable under the statute 1491; and no countenance was given in that case to a claim *super jure naturæ*. 4. Failing the father and mother, the direct paternal ascendants come next—the nearer prior to those more remote—the paternal grandfather, great-grandfather (*a*), etc. In one case, the mother and father were both destitute, and during the father's life the paternal grandfather was held liable for the grandchild's aliment (*b*). Again, a husband having deserted his wife and child, and gone abroad, the Court held the paternal grandfather bound to aliment the grandchild, until its own father returned (*c*). And in another case, the father of a solicitor, who died in indigent circumstances, was held liable in an aliment of £20 per annum to the child of the latter, payable half-yearly in advance to its mother (*d*). The rule that a grandfather is liable was recognised and given effect to in one case (*e*), where the father had died leaving two children unprovided for; though, in the circumstances of that case, the Court sustained an offer by the grandfather to receive one of the grandchildren into his family, as a sufficient implement of the legal liability imposed on him. The authorities seem to establish that a son's wife, at least where her own father is able to aliment her, has no claim against his father when deserted by her husband (*f*). 5. It has been doubted whether the children of a daughter can claim aliment from their maternal grandfather (*g*). But there is neither reason nor authority for this doubt. If Lord Stair does not state any liability as against them, it may be equally said that he does not state any

his Mother and his Father's Stepmother (1685), M. 403; and *Cunningham* v. *Dame Margaret Ramsay*, his step-grandmother (1715), M. 405.

(*a*) For the general principle, see Bankt. i. 6, 15; Ersk. i. 6, 56; Bell's Prin. 1633; Dunlop, p. 370, s. 35; *Wilson* v. *Cockpen*, 15 Feb. 1825, 3 S. 547, where the legal liability of a grandfather, even in the humbler walks of life, was clearly recognised, although the circumstances of the grandfather in that case were such that the Court assoilzied him from the claim. See *infra*, p. 92.

(*b*) *Christie* v. *M'Millan*, M. App. *v.* Aliment, No. 5 (1802).

(*c*) *Tait* v. *Whyte*, Mor. App. *v.* Aliment 3 (1802); *Belch* v. *Belch*, Hume, p. 1 (1798); *Brown* v. *Brown*, 10 July 1824, 3 S. 247.

(*d*) *Pagan* v. *Pagan*, 27 Jan. 1838, 16 S. 399.

(*e*) *Jameson* v. *Jameson*, 22 Nov. 1845, 8 D. 86.

(*f*) Cases of *Belch*, *Tait* v. *Whyte*, *Christie* v. *M'Millan*, and *Pagan*, *supra*. See *infra*, p. 104.

(*g*) Brodie's Notes to Stair i. 5, 7.

liability against the ascendants by the father. In truth, this matter is not minutely handled in Stair, but Erskine clearly states their liability; and it was so found in one case, though of consent (*a*). It was assumed in the argument in the case of *Nicoll* (*b*), where the Court held that such liability does not attach to the father of the mother of a bastard child. And as the legal obligation upon a mother to support her child arises *ex jure naturæ*, and is in the case of a lawful child incurred in a manner approved of by the law, there can be no doubt, that were the case to arise, the maternal grandfather, etc., would, failing the ascendants by the father, be found liable. 6. A person is not bound to aliment his brothers and sisters. Cases have indeed occurred, as will afterwards be shown, where younger children, being left unprovided for by their father, action was sustained against the elder brother, who succeeded to the father's estate, for an aliment to his brothers and sisters. But in these cases the obligation was not founded *in pietate*, or upon the natural obligation on one brother to aliment another, but upon the father's obligation, who being bound, *ex jure naturæ*, to aliment his children, the obligation transmitted against his *representative*. But except in this situation, no one is bound to support a collateral relation, such as a brother, or sister, or cousin, or uncle or aunt, or nephew or niece (*c*), and an uncle or aunt is not obliged to aliment a nephew (*d*).

Amount of aliment claimable by person destitute.

The amount of aliment which a person liable *super jure naturæ* can be compelled to pay his child, has, after several conflicting decisions, been at last settled by a judgment of the House of Lords to be nothing more than 'support beyond want; and all that is beyond *that*, is left to paternal affection' (*e*). The claim was there made against an entailed proprietor with £10,000 a year,

(*a*) Ersk. i. 6, 56; Dunlop, Paroch. Law, p. 371, s. 36; *Wilson* v. *K.-S. of Cockpen*, *supra*, p. 87, as in (*a*).

(*b*) *Nicoll* v. *K.-S. of Dundee*, 19 June 1832, 10 S. 670.

(*c*) Stair i. 5, 10; Bankt. Digression, i. 6, 6; Ersk. i. 6, 58 *in fin.*; *Fletcher* v. *Fletcher* (1696), 4 Sup. 294; *Anderson* v. *Gibson* (1754), M. 427, 5 Sup. 273; *Malcolm* v. *Malcolm*, M. 439 (1756); *Seton* v. *Paterson*, M. 429 (1761); *Clerk* v. *Clerk*, M. App. *v.* Aliment 2 (1799); *Duncan* v. *Hill*, 28 Feb. 1809, F. C.; More's Notes, p. 30, s. 7; Lectures, i. p. 84. See *infra*, p. 107 *seq.*

(*d*) *Bonar* v. *Bonar*, M. 6285 (1709); *Stuart* v. *Court*, 10 June 1848, 10 D. 1275.

(*e*) *Maule* v. *Maule*, 1 June 1825, 1 W. S. 266. See also *Moncrieff* v. *Moncrieff*, 21 March 1735, Cr. and Stew. p. 162; Stair i. 5, 7.

by his eldest son, who had been educated for and obtained a commission in the army, and to whom his father made an allowance of £100 a year. The Court of Session awarded him an aliment of £800 a year; but this was unanimously reversed in the House of Lords. The opinions of the Lord Chancellor and Lord Redesdale fully recognised the importance of the case; and the following passages from the latter, quoted in a recent case in the Second Division, explain the principle of the judgment: 'Whatever may have been the cases which have been determined, some of which go one way and some another, it does seem to me that the rule is properly laid down by Lord Kames (*a*): that the whole goes to this,—support beyond want; and that all that is beyond that is left to parental affection.' And again: 'As far as I have been able to look into the doctrine as laid down by the writers upon the civil law, the writers of various parts of Europe, they all lay down the same rule—that all that a parent is obliged to do, is to take care that his child shall not be indebted to the charity of others.' The opinions expressed in this case show that anything more than what is absolutely necessary for the support of the child is left entirely to the discretion of the father. A child thus supported, has no title in law to demand more, on the ground of the allowance being inadequate to, or inconsistent with, his father's rank and fortune. The rule thus laid down has been consistently acted on by the Scotch courts ever since, and it may be regarded as an established rule of law (*b*). In one case (*c*), the Court assoilzied a father from an action of aliment brought against him by his son, the defence stated by the father being, that his son had squandered patrimony which he had inherited from his grandfather; that he was of intemperate habits, and, though educated to a profession, his bad habits prevented him from obtaining employment; and that he (the father) had given him an allowance of 12s. a week until the son wrote him threatening letters demanding an increased allowance. The Court were unanimously of opinion that the case was not one in which they could interfere, at least until the son applied to the father in a very different spirit from that

(*a*) Kames' Prin. of Equity i. 109.

(*b*) See interlocutor in *Duncan* v. *Hill*, 17 Feb. 1810, F. C.

(*c*) *A. B.* v. *C. D.*, 9 March 1848, 10 D. 895.

Amount of aliment claimable.

which he had shown. In the recent case of *Bain* (*a*) also, the Court refused to interfere. The pursuer there was a daughter aged twenty-nine years, an only surviving child, who alleged that she was of weakly constitution, and unfit to enter employment or support herself, and that the only aliment allowed her by her father was the use of a small room and closet near his own house, with a weekly allowance of 5s. The father, on the other hand, alleged that the only impediment to her obtaining employment consisted in her own bad temper, and that it was owing to this that he had been obliged to require her to live separate from his family. The Court (Second Division) refused to interfere. Lord Cowan observed: 'The question is an important and delicate one. No doubt the Court at one time exercised considerable powers in some cases of this kind. But the powers of the Court were fully considered in the case of *Maule;* and since that case, I have never understood that it was within the power of the Court to decide whether the allowance given by a father to his child was right in amount, or was too little. That was not the question as dealt with in the House of Lords. The question dealt with by the House of Lords was, how far a court of law had power to interfere in such a matter.' 'Looking to that judgment, and applying it to the averments of the pursuer, I think we cannot interfere in this case.' The Lord Justice-Clerk (Inglis) observed: 'If we were bound or entitled to give effect to feelings, we could not refuse to allow an inquiry into the whole circumstances of the case; but fortunately for us, we have a general principle to guide us. That principle is, that we are to protect a child against want; and the principle goes no further. I think the principle is founded on sound considerations of social expediency.' The interlocutor of Court was: 'Find that the summons and condescendence contain no statements relevant and sufficient to justify the interference of the Court.' In another case (*b*), where the father was insane, a daughter aged twenty-nine, and in bad health, was found entitled to an aliment of £30 a year from the estate of her father, a retired major in the East India Company's service with an income of £268 per annum, and the *curator bonis* was decerned to pay it quarterly till further order of the Court. In

(*a*) *Bain* v. *Bain*, 16 March 1860, 22 D. 1021.

(*b*) *A. B.*, 6 March 1858, 20 D. 778.

the most recent case, an action of aliment by a mother against a son who had an income of £650 a year, the Court sustained an offer of £40 a year; but as it had not been made before the case came into court, they awarded expenses to the pursuer (*a*). The Lord Justice-Clerk (Inglis) thus stated his opinion: 'The question is, What is the necessity of the pursuer? and the only question as regards the defender is, Is he able to meet that necessity? The defender maintained that he was liable to pay nothing more than a bare subsistence sufficient to keep body and soul together. That is quite unsound. It is taken from the Poor Law, which ignores all social distinctions, and places all upon a level. If we were to apply the principles of the Poor Law to such a question as this before us, we would have not only to limit the amount to bare subsistence, but no party could maintain a claim of aliment who was ablebodied. Therefore that cannot be the principle.' 'The term necessity has a relative meaning,—relative to the situation of the party who makes the claim. One who has received the education of a gentleman cannot be said to be placed above want by getting a pauper allowance. As regards the condition of the defender, the Court cannot inquire further. Is he able to keep the pursuer above want? That is the only inquiry. If it is admitted, or if it clearly appears that he is, the Court cannot inquire further. It is now ascertained in this case that the defender is in such a position; and while we ought to have had fuller explanation from the pursuer of what her own history and circumstances are, it sufficiently appears that she is entitled to such a sum as to enable her to live as a gentlewoman, but on the most economical footing.' The other judges expressed similar opinions.

How the obligation to aliment is implemented.

The obligation may be implemented in the mode most suitable to the party liable, provided no injury will thereby arise to the party alimented. Parents therefore may compel their children to live in a separate lodging from their own (*b*); or they may take

(*a*) *Thom* v. *Mackenzie*, 2 Dec. 1864, 3 Macph. 177. See also *Landers* v. *Landers*, 25 March 1859, 21 D. 706, *infra*, where the mother being in receipt from her son of £10 more than her marriage contract provision, the Court refused to interfere to increase it, though the son had an income of £1500 a year.

(*b*) Bell's Prin. 1630; Wall. p. 277; Stair i. 5, 7. *Bain* v. *Bain*, *supra*; but see *Kirklands* v. *Kirklands* (1685), M. 403, where the Lords found that a mother was bound *jure naturali* to

them into their own house. If an offer of the latter kind be made, the child cannot claim a separate aliment. It has been so adjudged with regard to aliment claimed from the father and mother of the child (*a*), and on a claim by a married daughter against her father, who had entered into a second marriage (*b*): it has also been so decided with regard to the grandfather (*c*); and the principle seems applicable to all *ascendants* liable *super jure naturæ* (*d*). Where, however, the child is young, and of a tender constitution, the offer of a grandfather to take it into his own family, will not be admitted in preference to the mother, if the grandfather be able to afford a separate aliment (*e*). There is an exception to the rule, in the case where the parent offering to receive the child into family, has, when it was formerly there, maltreated it; in which case a separate aliment will be decreed (*f*). It will form no valid defence against the claim, that the party upon whom the burden is sought to be imposed is himself poor, provided the burden does not reduce him altogether to the situation of a pauper (*g*). Erskine (*h*) says, that 'though the parent himself should be reduced to necessitous circumstances, yet so long as he keeps house he is obliged to give the same entertainment that he takes to himself to such of his children as have not sufficient funds for their own subsistence.' The same rule would appear to be applicable to the case of all ascendants and descendants. Thus, in the case of *Tait* v.

aliment the younger children *in familia*, they being in infancy.

(*a*) Bankt. i. 6, 13; Ersk. i. 6, 56. *Buchan* v. *Buchan*, Mor. 411 (1666); *Dick* v. *Dick*, Mor. 409 (1666). Such an offer was not found sufficient when made by a stepfather in an action against him and her mother by a young woman whose portion was liferented by the mother.—*Moncrieff* v. *Fairholm* (1736), Elch. Aliment 4; M. 454.

(*b*) *Wallace* v. *Goldie*, 20 July 1848, 10 D. 1510.

(*c*) *Muirhead* v. *Father-in-Law*, Mor. 5927, 16322 (1706); *M'Kissock* v. *M'Kissock*, 1817, Hume, p. 6; *Wilson* v. *K.-S. of Cockpen*, 18 Feb. 1825, 3 S. 547; *Jameson* v. *Jameson*, 22 Nov. 1845, 8 D. 86.

(*d*) Dunlop, p. 372, sec. 41.

(*e*) *Kirklands* v. *Kirklands*, M. 403 (1685); *Pagan* v. *Pagan*, 27 Jan. 1838, 16 S. 399.

(*f*) *Hepburn* v. *his Father*, M. 410 (1734); *Morrison* v. *his Father*, M. 410 (1716). Bankt. i. 6, 13; Ersk. i. 6, 56.

(*g*) In *Wilson* v. *Cockpen*, 3 S. 547, their Lordships 'were agreed that, in the peculiar circumstances of the case, he (the grandfather) should not be subjected in the payment of aliment, from which the mere circumstance of his being a common labourer in the lower ranks of life would not have exempted him.'

(*h*) Ersk. i. 6, 56. See also Stair i. 5, 7; *Dick* v. *Dick* (1666), M. 409.

Whyte (*a*), the obligation to aliment was enforced against a grandfather, who was 'little better than a common labourer,' and who had a family of eight children to support. The report bears, that 'it seemed the first time that this question had ever been tried in the case of a peasant, and the hardship of laying down a general rule in a case such as this was strongly urged; entailing upon a poor and industrious race of men the burden of maintaining the numerous families of their children, at a time when their years and their labours merited a different reward. But the view taken by the majority of the Court was, that every man, according to his means, was bound to support his children and their descendants whenever it became necessary.' The 'ability' of those on whom the burden is sought to be imposed must be taken into view. The doctrine of Stair (*b*) is: 'Though the children be necessitous, yet there must first be reserved for the parents that which is necessary for their subsistence; so that, when they are not able to entertain their children, they may lawfully expose them to the mercy and charity of others.' The Court have repeatedly given effect to this in actions of aliment, where it appeared that the defendant was so situated as to be unable, without being utterly impoverished himself, to meet the demand. In an early case, an action of aliment against the father's widow, the Lords 'sustained not the aliment, in respect the defender's liferent was very mean, and the pursuer was major, and kept a brewery, and that she kept one of his children, and that he was not *frugi aut bonæ famæ*' (*c*). In *Ettrick* v. *Sword* (*d*), where the claim was made on behalf of a father and mother against their sons, the Court remitted to the Sheriff to 'take a proof as to the circumstances of the respondents.' In another case (*e*), a claim against a paternal grandfather to aliment two of his grandchildren, the maternal grandfather having taken into his family the mother and three out of a family of five children, the Court remitted to the clergyman of the parish to report as to the circumstances of the grandfather; and in a report by him detailing circumstances of very great poverty, the Court assoilzied

(*a*) 28 Feb. 1802, M. Aliment, App. 3. See also Dunlop, Par. Law 372, s. 42.

(*b*) Stair i. 5, 7.

(*c*) *Stirling* v. *Heriot*, 1669, M. 389. See also *Sibbald* v. *Wallace*, 1636, M. 388; *Napier* v. *Napier*, 1751, Elch. Aliment 12; *Auchinleck* v. *Auchinleck*, do. 13.

(*d*) 14 Feb. 1824, 2 S. 715.

(*e*) *Wilson* v. *Cockpen*, *supra*.

him from the claim, 'in respect it is sufficiently shown that the respondent is unable to bear the burden of alimenting, or even of contributing to their aliment, which burden he would be legally bound to bear if his circumstances enabled him to bear it.' In another case (*a*), where the defender, a grandfather, alleged that he was a poor man renting a small farm at £70 a year, and with difficulty able to maintain himself, and offered to take into his family one of two grandchildren, on whose behalf the action was raised, the Court, on a report from the elders of the parish, 'in respect of the defender's offer to take the eldest of the pursuers into his family, assoilzied him from the action.' The obligation to aliment is subject, in the case of claims by children or grandchildren against their parents or grandparents, to the defence known as the *beneficium competentiæ* (*b*). If an indigent parent have a number of destitute children, some of whom he is able to aliment, but not them all, Stair holds that the 'parents must first aliment their children in the family; and amongst those that are emancipated, the males are preferable to the females, who pass by marriage into other families' (*c*).

Can descendants liable in aliment compel claimant to reside in their family?

Although it thus appears that an ascendant may compel a descendant claiming aliment to enter his family if he wish in this way to implement his obligation, the converse does not universally hold, that a descendant may compel his father, mother, grandfather, to reside with him. Where the son is able to provide a separate aliment, and the parent is unwilling to reside in his house, the Court will decern him to pay a distinct weekly provision (*d*). The Court will, however, take into consideration the ability of the person on whom the burden of paying aliment is sought to be laid; and if, in the circumstances of the case, the offer to receive into his house appear to them to be reasonable and proper, they will sustain it as a sufficient implement of his obligation. It was so

(*a*) *Jameson* v. *Jameson*, 22 Nov. 1845, 8 D. 86.

(*b*) Ersk. iii. 3, 89. *Bontein* v. *Bontein* (1745), M. 1390 and 2895; *Hogs* v. *Hog* (1749), M. 1390, reversed 27 March 1750, Cr. and Stew. 469; *Hardies* v. *Hardie*, 1 July 1813, F. C.

(*c*) Stair i. 5, 9.

(*d*) See *Jackson* v. *Jackson*, 3 March and 17 Nov. 1825, 4 S. 186; *White* v. *White*, 10 March 1829, 7 S. 567; *Greig* v. *Crawford* (1817), Dunlop's Par. Law, p. 372; *Heritors and Kirk-session of Ettrick* v. *Sword*, 14 Feb. 1824, 2 S. 715.

decided in a recent case (*a*), where the claim was one of relief by a parochial board for advances which they had made to the defender's grandmother.

Alimentary debts contracted by a child, how far exigible from the father.

The obligation to aliment a child includes not only food, but also clothes and other necessaries. The father may provide these for the child, or he may give him a sum of money for that purpose. Should he fail to do so, he may be compelled either directly by an action of aliment, or indirectly by the person indigent contracting an alimentary debt, and allowing the creditor to proceed against the parent or other person bound to give the support (*b*). 'Necessaries to a person's wife or child born in wedlock are necessaries to himself' (*c*). Where the child lives in the father's family, and is possessed of no property or means of obtaining a livelihood, he is not liable for furnishings ordered by him (*d*). A father, by being bound to aliment his child, is held to have given an authority to the latter to contract for necessaries where the parental obligation is not otherwise fulfilled (*e*). The doctrine is even carried further; and it is settled, that where the child is not forisfamiliated, and has no property of his own, the creditor with whom he contracted has no action against him, but must proceed against the father as proper debtor (*f*).

What are necessaries to a child.

The goods furnished must, in their quantity and quality, be suitable to the rank and condition in life of the child, and at the same time be necessary for him; and if the tradesman allow himself to be imposed upon by false representations as to the child's circumstances, so as to furnish him in an extravagant manner, he can

(*a*) *Buie* v. *Stiven*, 5 Dec. 1863, 2 Macph. 208; *White* v. *White*, *supra*. Such an offer was sustained in *Greig* v. *Crawford*, 1817, *supra*, not reported. See Lord Alloway's speech in case of *Jackson*, last note.

(*b*) Stair i. 5, 7; Ersk. i. 6, 57.

(*c*) Evans' Pothier, ii. p. 29.

(*d*) *Hamilton* v. *Forrester*, 22 Feb. 1825, 3 S. 572; *Crichton* v. *Kilmarnock*, Elch. *v.* Minor, No. 11 (1744); More's Notes, p. xxix. No. 3.

(*e*) Ersk. i. 6, 57. *Wallace* v. *Crawford*, M. 13425 (1672); *Hopkirk* v. *Deas*, M. 12482 and 13426 (1698); *Strachan* v. *Stewart*, M. 9619 (1678); *Fergusson* v. *Muir*, M. 13427 (1730); *Barclay* v. *Douglas*, M. 9624 (1758); *Telfer* v. *Maxwell*, M. 9625 (1758).

(*f*) *Anderson* v. *Craig*, M. 13424 (no date); *Lamb* v. *Tweedie*, M. 13424 (1623); *Crichton* v. *Kilmarnock*, Elch. *v.* Minor 11 (1744); *Gray* v. *Purves*, 1816, Hume, p. 411; *Hamilton* v. *Forrester*, 22 Feb. 1825, 3 S. 572. The English law, according to a late decision in the Court of Exchequer, seems to be somewhat different.—*Mortmore* v. *Wright*, 6 Me. and W. 462.

recover no more from the father than what the Court will hold to have been suitable and necessary. Erskine's doctrine is, that the father is liable where the furnishings are suitable to the fortune of the child (*a*). It has been held that *money* advanced to a minor by one who has no authority from the father to do so, cannot be demanded from the father, or even from the minor himself (*b*). Where articles of clothing to an extravagant amount, or of an extravagant character, are furnished to a child, the tradesman cannot recover. In an early case the Court disallowed a charge of 'the price of a woman's black silk cloak, which the pursuer must have known to have been intended for the use of a person of the female sex, and not to be used or worn by the defender' (*c*). More recently the Court passed a bill of suspension in a case where, as the report bears, 'the father had supplied his son with everything that was truly necessary for him. The articles in this account are not of that description, but expensive and fashionable articles, such as laced boots, dress shoes, sealskin shoes, silk shoe-ties, and the like. A manufacturer's under-clerk of fifteen had no occasion for such articles; and the pursuers ought not to have encouraged his profuseness by furnishing him with any such on credit, and without a written order from his father.' On considering the accompts, which consisted chiefly of articles of an expensive sort, the Court thought it unsuitable and extravagant; and therefore, without taking an answer, they remitted to the Lord Ordinary to pass the bill (*d*). There is no recent case upon the point, but the law may be regarded as settled.

In England the same rule holds. The word *necessaries* from the earliest times has not been confined in the strict sense to such articles as were necessary to the support of life; but is a relative term, including all such articles as are suitable to the degree, estate, and condition of the defender. On this matter 'the true rule is this, that all such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant, or those who

(*a*) Ersk. i. 6, 57.

(*b*) *Strachan* v. *Stewart* (1678), M. 9619; *Hopkirk* v. *Deas* (1698), M. 13426; *Scoffier* v. *Read* (1783), M. 8936.

(*c*) *Scoffier* v. *Read*, *supra*.

(*d*) *M'Culloch* v. *Smellie*, 1799, Hume, p. 423.

represent him, cannot be made responsible' (*a*). The English courts have held a minor liable for a livery ordered for his servant, he being a captain in the army, and a servant being necessary to one in that rank; but in the same case they refused a charge for cockades furnished on his order to the soldiers of his company (*b*). A suit of regimentals for a volunteer corps, of which the minor was a member, has been held a necessary (*c*). But a chronometer has been held not to be necessary for a lieutenant in the navy, particularly when he was not in commission (*d*). The hire of a stanhope, and repairs made upon it, have been held not to be necessary; and the like with the hire of horses for hunting (*e*). But a different rule might probably hold as to horses hired for riding under medical advice, or where the health of the minor was such as to require it (*f*). In another case, where a tailor sued a minor for 'clothes supplied between 19th October 1829 and the end of July 1830, to the amount of £420,' it was left with the jury to say whether and how far, both as regarded quantity and quality, such furnishing was necessary (*g*). 'Some of the articles are clearly not necessaries. There is a racing jacket charged for; that cannot be suitable to any degree except that of a jockey; and if that were to be considered a necessary for a young gentleman, it will next be said that gambling is necessary for him. Eleven guineas for a waistcoat! Can that be considered necessary to any station in life, so as to charge a minor?' (*h*). It has also been held that rings, being matters merely of ornament, were not necessaries; but that a breast-pin and gold watch-chain might be necessaries: 'The former might be matter either of necessity or ornament; the usefulness of the other might depend on this, whether the watch was necessary; if it was, then the chain might become necessary itself.' The judges thus concurring with the jury on two of the points left to them, refused, however, to disturb a verdict finding that the whole were necessary (*i*).

(*a*) *Per* Baron Parke in *Peters* v. *Fleming*, 1840, 6 M. and W. 42.

(*b*) *Hands* v. *Slaney*, 1800, 8 T. R. 578.

(*c*) *Coates* v. *Wilson*, 1804, 5 Espinasse 152.

(*d*) *Berolles* v. *Ramsay*, 1815, Holt N. P. C. 77.

(*e*) *Charters* v. *Bayntun*, 1835, 7 C. and P. 52; *Harrison* v. *Fane*, 1840, 1 Man. and Gr. 550.

(*f*) *Hart* v. *Prater*, 1837, K. B. 1 Jur. 623; *Clowes* v. *Brooke*, 1738, Str. 1100.

(*g*) *Burghart* v. *Augerstein*, 1834, 6 C. and P. 690. See also *Story* v. *Perry* (1831), 4 C. and P. 526.

(*h*) *Per* Baron Alderson, *ibid.*

(*i*) *Peters* v. *Fleming*, *supra*.

Dinners, suppers, ices, fruits, and confectionery are not *prima facie* necessaries for an undergraduate whose meals are supplied in the common hall (*a*).

Parent not liable if child furnished with allowance.

The action will not lie, if the father have previously furnished the child with a competent allowance, or if the latter were provided *aliunde*, as by living under his parent's roof, where all his necessaries were supplied; and it is the tradesman's duty, before he trust a child, to make inquiry as to these facts (*b*). But on this point the same principle which has been applied to master and servant will hold, viz. that if the child be in the habit of dealing with a tradesman on credit, and the accounts so contracted have been regularly paid by the parent, it will be no valid defence, without notice of a change, that he had furnished the child with a sufficient allowance (*c*). On the other hand, if the child had never dealt on credit, or when he had done so, if his accounts were refused payment of by the father, then the plea of the latter, that he had furnished the son with sufficient to maintain him, will be sustained (*d*). The father's liability arises from presumed mandate, and therefore he is not liable where either the circumstances are not such as to justify this *bona fide* belief on the part of the tradesman, or where he has forbidden him to furnish the goods (*e*).

Seeing that the education of a child by its parent is only a duty of imperfect obligation, it seems to be at least the law of England, that a person cannot recover from a father expenses incurred in educating his children, unless there be an express contract, or peculiar circumstances from which a promise of repayment can be inferred (*f*).

(*a*) *Brooker* v. *Scott* (1843), 11 M. and W. 67; *Wharton* v. *M'Kenzie*, and *Cripps* v. *Hills* (1844), 13 L.J., Q.B. 130.

(*b*) Stair i. 5, 7; Ersk. i. 6, 57. *Wallace* v. *Crawford*, M. 13425 (1672); *Ferne* v. *Wilson*, 3 Sup. 384 (1680); *Hopekirk* v. *Daes*, 1698, M. 13426; *M'Culloch* v. *Smellie*, 1799, Hume 423; *Lamb* v. *Tweedie*, M. 13424 (1623); *Dictum* of Lord Tenterden in *Story* v. *Perry*, *supra*; and of Lord Erskine in *Steedman* v. *Rose* (1842), Car. and M. 422.

(*c*) *Barclay* v. *Douglas*, 1758, M. 9624; *Samson* v. *Goldie*, 1808, Hume 425; *Knox* v. *Hay*, Hume 351 (1813).

(*d*) Hutch. vol. ii. p. 258. *Ferne* v. *Wilson*, 1680, 3 Sup. 384; *Fergusson and Lillie* v. *Stephen*, 2 March 1864, 2 Macph. 804, where it was held that a father who had removed from Glasgow to Dundee, and who had previously paid accounts for furnishings to his sons, was not liable for furnishings made to them in Glasgow four years after the last account paid by him.

(*e*) Stair i. 5, 7. *Neilson* v. *Guthries and Gairn*, 1672, M. 5878; *Fergusson and Lillie* v. *Stephen*, *supra*.

(*f*) *Hodges* v. *Hodges*, Peake Addl. Ca. 79.

The father is never liable for the child's *quasi* delicts. If, for example, he were to break windows or demolish a neighbour's trees, or slander him, or commit any similar damage, the father would not be liable for the loss, because this is not a debt incurred for necessaries (*a*). A claim for a child's board falls under the triennial prescription (*b*).

Parent not liable for child's *quasi* delicts.

Triennial prescription.

During the father's life, the principle applies, *Filius constat esse in familia patris et non matris* (*c*); but after his death it would seem that the principle, which thus renders fathers liable for their children's alimentary debts, is equally applicable to the mother, grandfather, and other ascendants in their order; or against the father's representative, when a claim for aliment lies *super jure representationis*.

Liability of mother, etc., for such debts.

Where a child is possessed of property, and at the same time lives in family, or is otherwise alimented by a party liable *super jure naturæ* to aliment him, it often forms a question of difficulty to determine whether the aliment so afforded is held to have been advanced *animo donandi*, where there is no express agreement. The *presumption* of law is, that the aliment was given *ex pietate* if the party receiving it was of age to make a bargain (*d*).

Repayment of aliment.

(*a*) 1 Bankt. p. 254, sec. 47. See Evans' Pothier, ii. p. 40. See for an analogous rule in the law of husband and wife, *Scott* v. *Weil and Banks*, 1628, M. 6015; *A.* v. *B.*, 1634, M. 6072; *Sibbald* v. *Alvas*, 1678, M. 6074; *Selkrig* v. *Alison*, 1679, M. 6074; also the cases of *Murray* v. *Graham*, 1724, M. 6079; *Gordon* v. *Pain*, 1738, M. 6079; *Chalmers* v. *Douglas*, 1790, M. 6083.

(*b*) *Taylor* v. *Allardyce*, 16 Jan. 1858, 20 D. 401.

(*c*) *Haddan* v. *Lady Stainhouse and Tweedy her Son*, 1627, 1 Sup. 237.

(*d*) Stair i. 8, 2; Bankt. i. 9, 23; Elch. Dec. Notes, p. 18. To the case of a father, *Vans* v. *Vans*, 1736, Elch. Aliment 2. A mother, *Gordon* v. *Keith*, 1635, 1 Sup. 357; *Melville* v. *Fergusson*, 1664, M. 11433; *Guthrie* v. *Mackerston*, 1672, M. 10137. In the three last cases, held also to apply to stepfather during the mother's life, but not after her death. There seems, however, in some of the older decisions to be a distinction drawn as regards the heir, aliment given to him not being presumed always to be *ex pietate: Mongreenan* v. *Blair*, 1624, M. 11432; *Wilkie* v. *Morison*, 1675, M. 5923; *Row* v. *Rows*, 1676, M. 11436; *Gourlay* v. *Urquhart*, 1697, M. 11438. To the case of a grandfather and grandmother, *Lugton* v. *Hepburn*, 1672, M. 11435; *Ker* v. *Ruthven*, 1673, M. 11436; *Wemyss*, 1734, M. 11431, and Elch. Aliment 1; *Hamilton*, 1807, Hume 3. The same presumption was applied in a case between brother and sister, *Rig* v. *Rigs*, 1676, M. 11426; —between brothers, *Drummond* v. *Swayne*, 28 Jan. 1834, 12 S. 342. It was declared not to hold between uncle and nephew, *Chisholm* v. *Steedman*, 1703, M. 11429, Forbes' report; and without relationship it has no place, *Wilson* v. *Archibald*, 1701, M. 11427; *Spence* v. *Fowlis*, 1681, M. 11437.

The rules which have been settled are: 1. That though the relative furnishing the aliment have not expressly bargained to that effect, yet if the child be drawing annual profits from any source while so alimented, he is bound to pay out of these profits for the whole time he was supported (*a*). But this is a rule which may be overcome by a contrary indication of intention, shown by the relative in a *habile* mode (*b*). It is on this principle, and also in accordance with the maxim, *Debitor non presumitur donare*, that a father who has funds belonging to his children in his hands is not bound to account for annual rent or interest on them (*c*).

2. Where, again, the child has a small stock, from which no profits are derived, or from which the profits are insufficient to pay the aliment, the rule of law seems to be, that the relative liable as above is not entitled to demand repayment from the child out of the capital of his stock for the aliment given him, if no bargain to that effect has been made with the child, or with his administrator-in-law (*d*). 3. The subsequent acquisition of property by the child will not warrant a claim by a relative for repayment of aliment, previously given *ex pietate* (*e*).

4. If a party liable, *super jure naturæ*, only *subsidiarie*, should maintain the child, while the person liable on the same ground,

(*a*) *Hunter's Trs.* v. *Macan*, 25 May 1839, 1 D. 817; *Menzies* v. *Livingston*, 27 Feb. 1839, 1 D. 601; *Alcorn* v. *Charteris*, 1683, M. 11427; *Fraser*, 28 Nov. 1839, 2 D. 144.

(*b*) *Galt* v. *Boyd*, 19 Jan. 1830, 8 S. 332.

(*c*) *Winraham* v. *Ellis*, 1668, M. 11433; *Maxwell* v. *Brown*, 1669, M. 11435; *Aitken* v. *Goodlet*, 1706, M. 2562; *Irvine* v. *Irvine*, 1725, M. 11443; *Vans* v. *Vans*, 1736, M. 549, and Elch. Aliment 2; *Forbes* v. *H. M. Advocate*, 1756, M. 4678, as reversed; *Menzies* v. *Livingstone*, 27 Feb. 1839, 1 D. 601. See the English case of *Birch* v. *Sumner*, 1857, 3 Jur. N. S. 712. A father is also entitled to demand, from trustees who hold funds of his children, payment of the interest, to be applied to their education: *Willison* v. *M'Quarrie*, 9 Dec. 1830, 9 S. 160.

(*d*) *Galt* v. *Boyd*, *ut supra*; *Wemyss* v. *Children*, M. 11431, Elch. *v.* Aliment 1 (1734); *Ker* v. *Ruthven*, M. 11436 (1673); *Kimmerghame* v. *Hume*, M. 11438 (1731); *Guthrie* v. *Mackerston*, M. 10137 (1672); *Steele's Trs.* v. *Cooper*, 16 June 1830, 8 S. 926. But see *Row* v. *Row*, M. 11436 (1676). See *Irvine* v. *Irvine*, M. 11443 (1725). See *infra*, p. 104, as in (*b*).

(*e*) More's Notes, p. xxxii. sec. 16. *Home* v. *Wedderburn*, M. 412 (1757); *Drummond* v. *Stewart*, M. 412 (1756); *Gordon* v. *Keith*, 1 Sup. 357 (1635). But see *Mongreenan* v. *Blair*, 1624, M. 11432; and *Gourlay* v. *Urquhart*, 1697, M. 11438, in both of which cases the son, being fiar, action was sustained at the instance of the mother for aliment given to him during the time the estate was liferented.

primo loco, is capable of discharging the obligation, the former would have no claim against the latter for the maintenance so bestowed, unless he had expressly bargained to that effect. A grandfather, for example, could not maintain action in these circumstances against the mother (*a*). But if the grandfather had required the father to take home the child, the presumption of donation would be elided, and he could maintain action for aliment given subsequently to the date of requisition (*b*). But if a person, liable only *super jure naturæ*, should aliment children who ought primarily to have been maintained by one liable *super jure representationis*,—*e.g.* a mother after the father's death, while the father's heir took up his estate and was *lucratus* thereby,—the former has a claim of repetition against the heir, without any express agreement to that effect; 'for here the *pietas materna* had no weight, where the question was with extraneous heirs' (*c*). 5. Although a brother is not under a legal obligation to give aliment, yet if he does so, he will not in all cases have an action of repetition. The presumption that it was given *ex pietate* may strike against him (*d*); and in a late case, where a distant relation alimented a person from pupillarity and after majority, it was held, *tota re perspecta*, to have been done *ex pietate* (*e*). When the Court have by an order modified an aliment, they will not at a distance of time go back upon it, even on allegation of misrepresentation; and it is fixed that aliment which has been paid and consumed cannot be ordered to be refunded (*f*).

How the obligation ceases.

The obligation on parents to support their children is perpetual, and cannot be finally or irrevocably discharged; because, whatever may have been the conventions of parties, the law imposes upon the relations of the pauper an obligation to provide him with aliment which must be discharged; and so long as there are any relations in a position to discharge this obligation, no demand can

(*a*) *Ludquhairn* v. *Gight*, M. 11425 (1665); *Barclay* v. *Bervy*, 4 Sup. 491 (1700).

(*b*) *Gordon* v. *Lesley*, 1680, M. 11426.

(*c*) *Stirling* v. *Otter*, M. 11432 (1663); *Wilkie* v. *Morison*, M. 5923 (1675); *Gourlay* v. *Urquhart*, M. 11438, 4 Sup. 284 (1697).

(*d*) *Drummond* v. *Swayne*, 28 Jan. 1834, 12 S. 342; *Rig* v. *Rig*, 1676, M. 11426.

(*e*) *Ferguson* v. *M'Gachen*, 17 Feb. 1831, 3 Jur. 293, 9 S. 472. But see *Chisholm* v. *Steedman*, 1703, M. 11458.

(*f*) *Caldwell* v. *Jack*, 1685, M. 1766.

be made upon the parish (*a*). The obligation continues though the marriage be dissolved by divorce (*b*). There are, however, certain cases where these alternatives of the parish or the parent do not arise; but where the alternative is between the imposition of some hardship on the child, and the continuing the burden on the parent. And it is to these modifications of the general doctrine that the following observations relate.

Is aliment claimable when claimant has been instructed in a trade?

1. If the child be working at a trade or profession, by which he is able to earn as much as will support him, he cannot demand aliment from his father, *quia alimenta liberis non debentur nisi in subsidium* (*c*). But although the child have a trade, if he is unable to obtain employment, or, when obtained, to continue at it through disease, the obligation still subsists (*d*). Erskine says, that 'the obligation which lies upon parents to maintain their indigent children is perpetual.' In *Duncan* v. *Hill*, the report bears that 'their Lordships concurred in the opinion on the general point expressed by the Lord President, that by the law of nature and of this country, a father having sufficient means is bound to aliment his son in case of *necessity*.' On the other hand, the Court have found, that ability to earn a livelihood will, in every case not marked with peculiar circumstances, be held a sufficient bar to a claim of aliment; and accordingly they refused such a demand by a son, or by parties in his right, where he was in possession of his mental and bodily powers, had been educated and set up in business by his father, and had received about £10,000 from him (*e*). So likewise was it refused in the case of a young man who had been educated as a writer, but who, on account of his dissipated habits, could not obtain or had not employment, and who had squandered money

(*a*) Ersk. i. 6, 56; More's Lect. i. p. 83; Dunlop's Paroch. Law, p. 369, No. 32. *Dicta* in *Strathmore* v. *Strathmore's Trs.*, 13 Dec. 1822, aff. 17 June 1825, 1 W. S. 402; *Campbell* v. *his Father*, M. 448 (1741).

(*b*) *Dunn* v. *Matthews*, 22 Jan. 1842, 4 D. 454; *Whieldon* v. *Whieldon*, 2 S. and T. 388.

(*c*) Stair i. 5, 7; Ersk. i. 6, 53 and 59; Dig. xxv. 3, 5, 7.

(*d*) *Dick* v. *Dick*, M. 409 (1666). Dig. xxv. 3, 5, 7. *Ramsay* v. *Rigg*, M. 391 (1687); *Thomson* v. *Wilkie*, 1678, M. 419; *Duncan* v. *Hill*, 17 Feb. 1810, F. C.; *A.* v. *B.*, 6 March 1858, 20 D. 778. More's Lectures, i. p. 83. In England it has been held, that, except in the case of illness incapacitating from work, the Court has no jurisdiction to award aliment to a son after sixteen. *Webster*, 1862, 31 L. J. Mat. Cas. 184.

(*e*) *Hunter's Trs.* v. *Macan*, 25 May 1839, 1 D. 817. See *dicta* in *Maule* v. *Maule*, 1 June 1825, 1 W. S. 266.

received from his grandfather (*a*). In an older case, where the pursuer, the only child of the defender's late husband (the defender being his universal disponee), was fifty years of age, a widow, and had formerly received her portion from her father, the Lords found that the pursuer, who was able to earn the means of subsistence by her labour, had no claim (*b*). In the higher ranks, where children are educated to liberal professions, and where employment is precarious, the mere name of a profession, such as advocate or doctor, without business, is not enough. The principle upon which the Court in this case hold the father liable in aliment is this, that by training his child to such a profession, he tacitly becomes bound to maintain him until he receives employment (*c*). Where the child has been trained to no profession or trade, the obligation of the parent would subsist even after majority (*d*), and that even where

(*a*) *A. v. B.*, 9 March 1848, 10 D. 895.

(*b*) *Mearns* v. *Gibbon*, 1780, M. 399. Similar points to those mentioned in the text seem to have occurred in the following cases: *Sibbald* v. *Wallace*, 1636, M. 388, where one of the pleas sustained was, 'the pursuer likewise being a person major, past the age of forty years at least, and who either ought to have taken him to a calling, whereby to have lived, or else having an actual calling whereby he might live,—likeas he designed himself to be a preacher of the word of God.' *Heriot* v. *Law*, 1636, M. 388, an action by the young laird against his father, and his brother's widow. As to the relict, the Lords sustained the allegiance that 'the pursuer, being bred up with a writer, and now a man of perfect age, he ought to do for himself; at least he ought to seek his father, who in nature is bound for aliment to his son.' In *Stirling* v. *Heriot*, 1669, M. 389, 'the Lords sustained not the aliment, in respect the defender's liferent was very mean, and the pursuer was major and kept a brewery,' and that she 'kept one of his children, and that he was not *frugi aut bonæ famæ*.' In *Sandilands* v. *his Mother*, 1700, M. 385, the defender pleaded, The pursuer had been educated as a writer; 'but you deserting that, I bought you an ensign's place in the army, where you were likewise turned out, and married unworthily.'

(*c*) *Dick* v. *Dick*, M. 409 (1666); *Strachan* v. *Stewart*, M. 9619 (1678), son an advocate. 'The Lords found the father liable to have alimented his son according to his quality and estate, so far as he could not entertain himself by his own industry.' *Ayton* v. *Colville*, M. 390 and 451 (1705), son an advocate. This plea was sustained: 'The name of an employment will not afford a man bread, neither is the race always to the swift nor the battle to the strong; and we have known many advocates who have risen to a great eminency and practice, who at the beginning have had little or no employment.' See *Maule* v. *Maule*, *supra*.

(*d*) *Samson* v. *Goldie*, Hume 425 (1808). In *Ramsay* v. *Rigg*, 1687, M. 391, the 'President said it imported not whether the pursuer was major or minor, if he could not live *aliunde*, and was not bred by his parents to a trade which could make him subsist.'

the child has squandered away his patrimony (*a*). But it would subsist only so long as will be necessary to enable the child to acquire a trade. This has been decided with regard to an illegitimate child (*b*).

Aliment not claimable where claimant has means of raising money himself.

2. If a child have a separate stock or estate of his own, from which he could, by sale or otherwise, in any way raise sufficient to aliment him, it is thought that he cannot claim aliment from his parents, though he be staying in their house. And if they do maintain him, they are entitled to board (*c*). The right to claim aliment implies, in the very description of the obligation, that, as a claim of debt, the right of action in any particular case is not absolute, but qualified and conditional. The right supposes that the party has not aliment or the means of aliment already.

How long daughters must be alimented, and by whom, when they are married.

3. Daughters must be alimented by their parents in the higher ranks of society till marriage, and in the lower till they arrive at such an age as to be able to go to service and earn a livelihood for themselves (*d*). After a daughter's marriage, the obligation to aliment falls upon her husband (*e*), and this even though she still continue to reside in family with her father (*f*). After her husband's death, she is entitled to aliment from those who are *lucrati* by his succession (*g*). Where her husband is unable to implement

(*a*) *M'Donald* v. *M'Donald*, 20 June 1846, 8 D. 830.

(*b*) See *Pott* v. *Pott*, 7 Dec. 1833, 12 S. 183. See the observations of Wallace (p. 280) on this doctrine.

(*c*) Warnkönig Com. vol. iii. p. 25; Stair i. 5, 7; Bankt. i. 6, 1; Ersk. i. 6, 53 and 56. *Maxwell* v. *Brown*, M. 11435 (1669); *Irvines* v. *Irvine*, M. 11443 (1725); *Drummond* v. *Stewart*, M. 412 (1756); *Maidment* v. *Landers*, 6 Dow 257 (1818), as explained in Ivory's note to Erskine, *loc. cit.*, and in Bell's Dict. *v.* Aliment, and *Drysdale* v. *Drysdale*, 3 Dec. 1831, 10 S. 98. But see *Cooper* v. *Steele*, 16 June 1830, 8 S. 926; *Menzies* v. *Livingston*, 27 Feb. 1839, 1 D. 601; *Hamilton* v. *Hamilton*, 11 July 1834, 12 S. 924. And see *supra*, p 100, as in (*d*), in regard to the right to demand repayment of aliment once granted.

(*d*) *Cairns* v. *Bellamore*, M. 410 (1687); *Dunn* v. *Matthews*, 22 Jan. 1842, 4 D. 454; Ersk. i. 6, 58; also *Douglas* v. *Douglas*, 1739, M. 425; *Bissets* v. *Bisset*, 1748, M. 413; *Dalziel* v. *Dalziel*, 1788, M. 450.

(*e*) *Neilson* v. *Guthries and Gairn*, 1672, M. 5878; *Auchinleck* v. *E. Monteith*, 1675, M. 5879; *Campbell* v. *Laird of Ebden*, 1676, M. 5879; *Lady Kinfauns* v. *her Husband*, 1711, M. 5882; *Murray* v. *Neilson*, 1664, M. 5921; *Wilkie* v. *Morison*, 1675, M. 5923; *Monteith* v. *his Sister-in-Law*, 1685, M. 5926; *Gordon* v. *Inglis*, 1681, M. 5924.

(*f*) *Alston* v. *Stainfields*, M. 6007 (1682). See *Maxwell* v. *Maxwell*, M. 423 (1711).

(*g*) *Countess Dowager of Caithness* v. *E. Fife*, 1767, M. 431; *Thomson* v. *M'Culloch*, 1778, M. 434. In *Lowther* v. *M'Lean*, 1786, M. 435, the Lords thought 'the claim of an indigent

the obligation, it has been doubted whether she is entitled to claim aliment from his father. Primarily, she must apply to her own father, from whom she is in such circumstances entitled to claim aliment (*a*). As formerly observed, a father may discharge this obligation by an offer to receive his daughter into his family. In the case noted below (*b*), Lord Fullerton observed: 'The daughter must either hold herself as forisfamiliate, in which case she has no claim; or if she chooses to hold herself as still *in familia* and to have a claim against her father, she must submit to the ordinary rule, and accept his offer to receive and aliment her in his family.' But the liability of the husband's father is more doubtful. The decisions on this point have been very contradictory. In the early case of *Lauder* (*c*), where the father was proprietor of an entailed estate, and the son had formed a runaway match with a person of inferior rank, the claim was allowed. And in a later case (*d*) it was laid down, that a father was under obligation to aliment his son's wife 'during his son's life and incapacity to maintain her.' But in three other cases, already referred to (*e*), the Court, while it subjected the paternal grandfather in aliment to the grandchildren, disallowed the claim as to the son's wife. While the decisions have thus varied as to the father's liability during his son's life, they have been equally varied as to such liability after his death. In the subsequent stage of a case, already quoted (*f*),

widow for aliment from the heir of her opulent husband as deeply founded in nature.' *Young* v. *Campbell*, 1790, M. 400; *Fergusson* v. *Logan and Ross*, 1809, Hume 5. In *M'Cowan* v. *Paterson*, 20 May 1809, F. C., where the husband had left some small houses, Lord Newton said, that 'in this case he had great doubt whether any aliment was due. The pursuer, before marriage, had been in the rank of a servant, earned her bread by her hands, and never was out of that line of life. After her husband's death, she must earn her bread in the same way she had done before marriage.' Lord Meadowbank was of the same opinion, and the Lords dismissed the claim. But in *Smith* v. *Smith*, 11 March 1812, F. C., where the estate was larger, the judges awarded an aliment; and the report bears that some of the judges doubted whether the decision in *M'Cowan* had been rested on sound principles.

(*a*) Ersk. i. 6, 56; *Wallace* v. *Goldie*, 20 July 1848, 10 D. 1510.

(*b*) *Wallace* v. *Goldie*, *supra*.

(*c*) *Adam* v. *Lauder*, 1762, M. 398 and 15419.

(*d*) *Duncan* v. *Hill*, 17 Feb. 1810, F. C.

(*e*) *Belch* v. *Belch*, 1798, Hume 1; *Tait* v. *Whyte*, 1802, M. App. Aliment 3; *Christie* v. *M'Millan*, 1802, M. App. Aliment 5. In this last case, the Court, 'while it seemed in some degree to doubt the propriety of the decision in the case of *Lauder*, altogether thought it at any rate inapplicable to this case.'

(*f*) *Adam* v. *Lauder*, 1764, M. 400.

the claim allowed during the son's life was disallowed after his death. But in another (*a*), where the pursuer was the daughter of one of the 'first families in Ireland, and her son the heir of entail and of the title of his grandfather,' the Lords awarded an aliment. In a later case, where the claim was made against both a father-in-law and a brother-in-law, who had succeeded to the husband's estate, and aliment was found due by the brother-in-law, as representing the husband, the Lord President observed that it was not necessary to decide whether *de jure* the widow had any claim against her father-in-law. 'I am glad of it, as it is a question of difficulty, and would require to be considered at length' (*b*). In another case (*c*), where the pursuer had originally been a common servant, 'the Court were unanimously of opinion that the pursuer, from her situation in life, was not entitled to aliment from her husband's father, and that the case of *De Courcy* was not applicable.' The point arose for decision in a recent case (*d*), where the husband, a solicitor, died in indigent circumstances; but the matter does not seem to have been pressed, as aliment to the grandchild was awarded of consent of the grandfather. The law cannot therefore be regarded as conclusively settled by any decision. In the cases where the claim has been refused, the pursuer was originally in the lower ranks of life; and in the one case where it was allowed, she was of good family, and mother of the heir to a large estate. Should the case again arise, where the husband has left no estate from which the widow can claim aliment, and her father, or his representatives, are not in a position to give aliment, it is thought that the husband's father, being himself in opulent circumstances, would be subjected in aliment to the widow.

Obligation to aliment not discharged, though claimant have squandered his fortune.

Elchies puts the question, 'Should a parent give a portion to a son, and he, by rioting, squander it away, would that exeem the

(*a*) *De Courcy* v. *Agnew*, 1806, M. App. Aliment 8.

(*b*) *Fergusson* v. *Logan and Ross*, 1809, Hume 5.

(*c*) *Yuille* v. *Marshall*, 21 Dec. 1815, F. C. In *Duncan* v. *Hill*, 28 Feb. 1809, F. C., the judges thought that the case of *Agnew* was a dubious authority. In *Duncan* v. *Hill*, 17 Feb. 1810, F. C., the majority of the judges, 'concurring in the opinion on the general point expressed by the Lord President, that our decisions had subjected the father to the obligation of alimenting the wife of his son during his son's life and incapacity to maintain her,' awarded an aliment of £20 during the life of her husband.

(*d*) *Pagan* v. *Pagan*, 27 Jan. 1838, 16 S. 399.

parent from the natural obligation of alimenting? And it seems it would not, no more than the parent's vices would exeem the children from that duty' (*a*). This doctrine has been sanctioned by later authorities (*b*).

Claim subsists, though child have discharged it.

In its origin, the claim of aliment is coeval with the paternity of the child, and forms one of those *jura sanguinis* which no private agreement can defeat. No compact between parents and children, that they shall not maintain each other, when the one is reduced to extremity and the other in condition to support him, can be effectual in law. 'Though children would discharge their parents of natural affection, education, provision, etc., or parents would free their children of reverence, obsequiousness, and of entertainment of parents not able to entertain themselves; yet would these obligations still be binding upon either' (*c*).

Aliment due *ex jure representationis*, and not *ex debito naturali*.

II. On the death of a party bound to aliment another *ex pietate*, it does not always follow that the person claiming aliment can proceed against the party next in the order above detailed. If the deceased left property, the law says that the heir who succeeds to it shall take it with all its burdens; and although he would not himself be bound to pay aliment *ex pietate*, yet he will *quâ* heir of one so liable. This liability originates not from any principle of natural law, but solely *super jure representationis;* and consequently its operation in any particular case must be tried not by a reference to the law of nature, but to that practice and those rules which have led to its introduction into, and governed its application in, the law of Scotland.

Heir of father or mother must aliment brothers and sisters.

1. An eldest son succeeding to his father's property must give a competent support to his younger brothers and sisters, in so far as he may be *lucratus* by the succession (*d*). And although

(*a*) Annot. p. 31, and Bell's Dict. *v.* Aliment.

(*b*) Erak. i. 6, 56; *dicta* in *Strathmore* v. *Strathmore*, 13 Dec. 1822 and 17 June 1825, 1 W. S. 402. But see *A. B.* and *C. D.*, 9 March 1848, 10 D. 895.

(*c*) Stair i. 5, 1.

(*d*) Stair i. 5, 10; Erak. i. 6, 58; Prin. iii. 1, 4. The principle was applied in the following cases, where the children seem to have been unprovided: *Children of Netherlie* v. *the Heir*, 1663, M. 415, 2 Sup. 576; *Hastie and Kerr* v. *Hastie*, 1671, M. 416—a posthumous child; *Elphingstone* v. *Elphingstone*, 1688, M. 451; *Don* v. *Don*, 1697, M. 420; *M'Douall* v. *Marshall*, 1705, M. 421; *Somervells* v. *Drum*, 1711, M. 422; *Children of Forbes* v. *Forbes*, 1715, M. 424; *Douglasses* v. *Douglass*, 1739, M. 425, Elch. Aliment 9; *Bissets*

Erskine (*a*) confined the rule to the case where he took up *heritage*, yet this is not now held as law; the rule being of general application to heritage and moveables (*b*). An heir succeeding to an estate is bound to aliment the widow and children of a predeceasing heir, who died in apparency after possessing the estate for some time (*c*). 2. The same rule holds with regard to the mother's heir, or executor, or universal disponee (*d*).

Whether heirs of remoter ancestors must aliment relations of such ancestors.

3. But whether the heirs of more remote relations are liable, is a point unsettled. Elchies holds it to be ridiculous to say, that the heir of a great-grandfather is bound to support a relation of the latter, because the great-grandfather himself would have been liable to do so (*e*). Since Elchies wrote, the authorities have been extremely fluctuating, and deductions of the most opposite character have been drawn from the adjudged cases (*f*). So far as rules can be deduced from decided cases, which are very contradictory, the following appears to be the result.

Aliment to ascendants and descendants

With regard to ascendants of the person deceased, his father, mother, grandfather and grandmother, are entitled to aliment from

v. *Bisset*, 1748, M. 413; *Logan* v. *Campbell*, 1758, M. 428; *M'Rostie* v. *M'Rostie*, 1818, Hume 9. In *Turnbull and Aikman* v. *Turnbull*, 1724, M. 452, which was a claim of aliment against a brother, founded on the terms of a marriage contract, the Lords assoilzied from the action as laid, 'without prejudice to the pursuer to insist for an aliment for her daughter *ex jure naturæ*.' See also *Chiesley* v. *Edgar*, 1676, M. 417, 2 Sup. 202. In the following cases there were bonds of provision; but the term of payment not being come, the heir was found liable in aliment meanwhile: *Otter* v. *Otter*, 1663, M. 414; *Frazer* v. *Frazer*, 1663, M. 415—a daughter of a second marriage; *Stuart and Innes* v. *Rosyth*, 1668, M. 415; *Children of Lauriston* v. *Lauriston*, 1677, M. 418; *Straitons* v. *Lauriston*, 1679, M. 418; *M'Neill* v. *M'Neill*, 1749, M. 426.

(*a*) Ersk. i. 6, 58.

(*b*) Note by Ivory to Ersk., *ibid.*; *Stokers* v. *Mowbray*, 1 Sup. 332 (1632); *Thomson* v. *Wilkie*, 1678, M. 419; *Scott* v. *Sharp*, 1759, M. 440, and App. Parent and Child 1.

(*c*) *Seatons* v. *the Heir*, M. 431 (1764); *Thomson* v. *M'Culloch*, 1778, M. 434; *Lowther* v. *M'Lean*, 1786, M. 435; *Fergusson* v. *Logan and Ross*, 1809, Hume 5; *M'Conochy* v. *M'Conochy*, 26 Feb. 1830, 8 S. 604, and 2 Jur. 260.

(*d*) *Scott* v. *Sharp*, M. 440, and App. *v.* Parent and Child 1 (1759); Bankt. i. 6, 16; *Thomson* v. *Wilkie*, M. 419 (1678).

(*e*) Elch. Annot. p. 31.

(*f*) Thus Ivory says: 'It would seem that in every case, the representative of a person deceased, whether the degree of relationship be nearer or more remote, and whether the succession by which they are *lucrati* be heritage or moveables, are out of this succession liable in aliment to those whom the deceased himself was under a natural obligation to maintain' (note to Ersk. i. 6, 58). On the other hand, this unqualified doctrine has been thus

of person to whom heir has succeeded.

the heir succeeding to the estate, however distant may be the heir's relationship to the deceased (*a*). The immediate children of the deceased are also entitled to aliment from the heir. Such, in the ordinary case, are younger children claiming from their elder brother. But it is doubtful whether individuals can claim aliment from an heir succeeding to an estate, on the ground that their grandfather had possessed the estate, and that the heir succeeding was his representative. In an early case, where a brother succeeded his grandfather in an opulent estate, this plea was expressly overruled (*b*). In a later case, 'the Lords considered a claim for aliment, though competent against parents or other very near relations *super jure natura*, not to be transmissible against their representatives, by which it might be extended *very far indeed*' (*c*). In another case, where the claim was at the instance of a sister against her brother, who did not represent his father, who represented his grandfather only as heir of entail, but who represented universally his great-grandfather, 'the Lords found that in the circumstances of this case the pursuer has no such claim of aliment against her brother as can be enforced in a court of law' (*d*). In a recent case, where a party had divided his fortune equally between his two sons, and one of them, after having expended his share of his father's succession, died, leaving a child, born subsequent to his grandfather's death, entirely unprovided for; the other son was imbecile, and was under curatory, and his fortune was more than sufficient for his maintenance:—an action having been brought at the instance of the child against the *curator bonis* of the uncle, claiming aliment

contradicted: 'The representatives of a grandfather are, agreeably to the latest decisions, not liable, because, were this obligation to go beyond the representatives of the immediate parents, there would be no knowing where to stop' (2 Hutch. Jus. Peace, p. 261).

(*a*) *Buchanan* v. *Morrison*, 21 Jan. 1813, F. C.; *Muirhead* v. *Muirhead*, 7 July 1849, 11 D. 1262, and 15 Dec. 1849, 12 D. 356.

(*b*) *Seaton and Paterson* v. *Paterson*, 1761, M. 429, the plea being, 'that if old Sir John, their grandfather, had been alive, he would certainly have been liable to aliment them; and if that was so, so must their brother, who represents him.'

(*c*) *Mearns* v. *Gibbon*, 1780, M. 399. See also *Anderson and Gibson* v. *Gibson*, 1754, M. 427, where a brother who succeeded to an estate from his granduncle was found not liable to aliment his sister; *Duncan* v. *Hill*, 28 Feb. 1809, F. C., where it was found that the defender, who represented his grandfather, was not liable to aliment his aunt-in-law.

(*d*) *Clerk* v. *Clerk*, 1799, M. App. Aliment 2.

from his estate on the ground that he represented the grandfather, against whom the pursuer as his grandchild would have had a legal claim for aliment;—the Court held that the grandfather, when he left half of his property to the pursuer's father, satisfied every obligation that was incumbent on him; and that the pursuer was not entitled to claim aliment from the uncle, as representing his grandfather by having received a succession from him (*a*). The Lord Justice-Clerk (Hope) observed: 'The cases which have been cited to us have no bearing upon the facts of the present case; they were the cases of succession to a family estate. Besides, if we were to sanction this, where is it to stop? How many generations back would a party be entitled to go? I was anxious to see if there was any ground on which we could grant this application, but I can really see none. The pupil has no case. The grandfather divided his funds between his children, and their children must follow the fortunes of their fathers. The grandfather entrusted the fate of his unborn grandchildren to his own child, for whom he adequately and even fully provided, and every duty incumbent on him by law or nature was thereby satisfied.' The cases in which the Court appear to have recognised an opposite doctrine are distinguished by special circumstances, attention to which explains the judgments, and makes them harmonize with the above-mentioned decisions (*b*).

Liability transmits against trustees as well as heirs.

4. The obligation transmits against the father's representatives, whether they have succeeded to the property by the ordinary course of law, or taken it up by a conveyance from him (*c*). The trustees appointed by the father's settlement incur the same liability (*d*). But this doctrine must be taken with the limitation, that although

(*a*) *Stuart* v. *Court*, 10 June 1848, 10 D. 1275.

(*b*) *In Seatons* v. *the Heir*, 1764, M. 431, a brother who succeeded his grandfather in an estate, was found liable in aliment to his sisters; but his father had possessed the estate in apparency, though his not having made up titles enabled the heir to pass him by. In *Dalziel* v. *Dalziel*, 1788, M. 450, the defender, who succeeded his father in an estate, was found liable in aliment to a niece; but she was the daughter of an elder brother, whose premature death opened the succession to him.

(*c*) *Scott* v. *Sharp*, M. App. *v.* Parent and Child 1 (1759); *Hasty* v. *Hasty*, M. 416 and 5922 (1671); *Drummond* v. *Swayne*, 28 Jan. 1834, 12 S. 342; *Fenton* v. *Scott*, 26 May 1832, 4 Jur. 457.

(*d*) *Riddell* v. *Riddell*, M. App. Aliment 4 (1802); *Ormiston* v. *Wood*, 22 Dec. 1838, 11 Jur. 232.

a parent is under a natural obligation to support his children during his life, yet he may leave his property entirely to a stranger after his death, and thus exclude the children's claim (*a*).

Liability of an heir of entail.

5. As an heir of entail does not represent his father or other ancestor, he is held not bound to aliment those whom a predeceasing heir of entail was bound to support; and consequently his brothers and sisters could demand nothing from him (*b*). 'The law is quite fixed that an heir of entail is not liable to aliment his younger brothers and sisters' (*c*). In special circumstances, where a father who was bound by antenuptial contract of marriage to make large provisions for his widow and younger children upon his succeeding to the entailed estates, predeceased his father, and the son succeeded his grandfather in the estates, the Court awarded a large sum in name of aliment for the heir. The report bears, 'that their Lordships were influenced by the disappointment of the provisions in the marriage contract, arising in great part from the unexpected death of Mr H. before his father, by which event the entailed estate had escaped all burden either in favour of the widow or daughter' (*d*). But an heir of entail would be bound to aliment his father or mother, or others who claim support from him, as a *debitum naturale* (*e*).

How long the liability of an heir for aliment subsists.

6. The father's heir, thus called upon to pay aliment, is not liable for it to his younger *brothers* any longer than till they arrive at majority, although they may never have been educated to a trade, or however destitute they may be (*f*), unless from mental

(*a*) See the cases of *Riddell* and *Scott*.

(*b*) *Malcolm* v. *Malcolm*, M. 439 (1756); *Clerk* v. *Clerk*, M. App. Aliment 2 (1799); *Fletcher* v. *Fletcher*, 11 July 1838, F. C. and Jur.; *Jackson* v. *Gourlay*, 24 Dec. 1836, 15 S. 313; also *Hamilton* v. *Hamilton*, 12 Feb. 1835, 13 S. 452; *Grant* v. *Cameron*, 24 Feb. 1838, 16 S. 652.

(*c*) *Per* Lord President in *Jackson* v. *Gourlay*, *supra*.

(*d*) *Hamilton* v. *Hamilton*, 12 Feb. 1835, 13 S. 452.

(*e*) *Muirhead* v. *Muirhead*, 1 Feb. 1845, *supra*, p. 86 (*a*); *Campbell* v. *Campbell*, 25 Feb. 1809, F. C.; *Muirhead* v. *Muirhead*, 7 July 1849, 11 D. 1262; and 15 Dec. 1849, 12 D. 356. See cases in note (*b*), *supra*.

(*f*) Bankt. i. 6, 16; Ersk. i. 6, 58; *Douglas* v. *Douglas*, M. 425, Elch. *v.* Aliment 9 (1739); *Strathmore* v. *Strathmore*, *supra*, p. 107 (*b*); also *Hunter's Trs.* v. *Macan*, 25 May 1839, 1 D. 817, interlocutor of Lord Ordinary; also *Bissets* v. *Bisset*, 1748, M. 413, and Elch. Aliment 11. In *Hastie and Ker* v. *Hastie*, 1671, M. 416, the heir was made 'liable during his brother's minority, at least so long of his minority as he was without calling or means to aliment himself,'

or bodily infirmity they are incapable of earning a subsistence (*a*). The aliment to *sisters* (the family being of rank) will continue even after majority till their marriage; for the daughters of gentlemen can do as little for themselves after as before majority, till they get a husband to provide for them (*b*). Kilkerran says: 'This is a matter that may be thought to depend upon circumstances. Suppose an heir to enjoy an opulent estate, and to represent a family, with the dignity of which it could not well consist that the daughters should go to service, marriage would still seem to be the proper period for the endurance of the aliment' (*c*). In the case of *Dalziel* the report bears, that 'the circumstance in this case which chiefly induced the Court to appoint the aliment to continue *after majority* was, that the pursuer was the grandchild of the representative of a family of such dignity, that although she was the issue of a clandestine marriage with an obscure woman, yet it was inconsistent with the honour of the family to permit her to be in a situation in which she might be under the necessity of engaging in some mean employment for her subsistence.' In the humbler ranks, aliment will only be allowed until the children are of an age capable of working for themselves, as milliners or servants (*d*). After marriage of a daughter, she has no claim for aliment against her brother (*e*). Ordinarily a sister is entitled to a separate aliment; but if circumstances call for it, the Court will sustain as sufficient an offer to receive her into her brother's family, or to pay separate aliment, on condition of the sister living with one of certain relatives named (*f*).

but on no account beyond majority. In *Don* v. *Don*, 1697, M. 420, aliment was given only up to fourteen; and in *Seatons* v. *the Heir*, 1764, M. 431, the same limit was fixed, 'the judges considering that children arrived at fourteen may make a shift for bread to themselves.'

(*a*) *Thomson* v. *Wilkie*, M. 419 (1678).

(*b*) *Douglas* v. *Douglas*, *supra; dictum* of Kilkerran in *Bissets* v. *their Brother*, M. 413 (1748); *Dalziel* v. *Dalziel*, M. 450 (1788); Ersk. i. 6, 58. But see Bell's Illus. vol. ii. p. 313; and for the effect of modifying circumstances, the cases of *Don* and *Seaton*, *supra*, where the aliment was limited respectively to twelve and fourteen.

(*c*) *Dictum* of Kilkerran in *Bissets* v. *their Brother*, 1748, M. 413. The aliment in that case was, in consideration of peculiar circumstances, the family not being of high rank, and the estate being small, fixed to continue only till majority or marriage, whichever should happen first.

(*d*) Ersk. i. 6, 58; *Fletcher* v. *Fletcher*, 4 Sup. 294 (1696). Note in Mor. Dict. p. 450. *M'Rostie* v. *M'Rostie*, Hume 9 (1818).

(*e*) *Maxwell* v. *Maxwell*, M. 423 (1711). Stair i. 5, 10.

(*f*) Case of *Maxwell*, *supra*.

7. With regard to both sons and daughters, the heir is only liable to aliment them till their own provisions become due (*a*). If the provisions bear interest before the day of payment, the heir may demand it for their support (*b*). And if they act as servants to him, this will be held to compensate the aliment, in those cases where he was not under an obligation *aliunde* to give it (*c*). 8. It was formerly doubted whether the heir or the mother were primarily liable (*d*); but it was at last settled that the heir was so, on the ground of his being *lucratus* by the succession, whereas the mother is only liable *super jure naturæ* (*e*). The mother's liability, however, comes into existence if the estate to which the eldest son has succeeded be insufficient to afford a suitable aliment to the claimants, and a maintenance to the heir. The mother here will be obliged to make up the deficiency from her jointure (*f*); and the rule has been extended to the case of a stepmother (*g*).

SECTION III.

DUTIES OF CHILDREN TO PARENTS.

Reverence and obedience.

I. 'The obligation of children towards their parents consists mainly in their obedience to them, and their duty to aliment and supply them in all their necessities, according to the children's ability.' The duties of reverence and obedience which children owe their parents have no 'civil remeids' (*h*), and cannot be enforced. Where, however, the child proceeds to the extent of cursing his parent, he may be criminally prosecuted. It is declared by statute (1661, c. 20), that a child above the age of sixteen years, who, not

(*a*) See *supra*, p. 108, note; also *M'Kenzie* v. *M'Kenzie*, 29 July 1773, not reported, Arniston Sess. Pap. Adv. Lib. vol. cxi.

(*b*) *Gordon* v. *Maitland*, M. 11168 (1757); *Dudgeon* v. *Arnott*, 19 Nov. 1830, 9 S. 36.

(*c*) *Thomson* v. *Thomson*, 18 Dec. 1829, 2 Jur. 117, 8 S. 267.

(*d*) *Frazer* v. *Frazer*, M. 415 (1663).

(*e*) Obs. of Kilkerran in *Douglas* v. *Douglas*, M. 425 and 413, Elch. *v.* Aliment 9 (1739); Ersk. i. 6, 58.

(*f*) *Ibid.*, and *Bisset* v. *Bisset*, M. 413, Elch. *v.* Aliment 11 (1748).

(*g*) *Ayton* v. *Colville*, M. 390 and 451 (1705). See also *Kirklands* (1685), M. 403, and *Cunninghame* v. *Ramsay* (1715), M. 405.

(*h*) Stair i. 5, 8.

being distracted with harsh or cruel treatment, shall beat or curse a parent, shall be punished with death. A panel convicted of assault, and beating and cursing his parents, was sentenced to seven years' transportation, on restriction of the pains of law (*a*). A similar sentence was pronounced in a recent case (*b*).

Aliment to parents by children.

II. The obligation of maintenance between parents and children is reciprocal. An indigent parent, whether father or mother, or other ascendant, is entitled to aliment from children (*c*). It has been recently held that a son is bound to maintain an indigent parent; and therefore a widow, who had been supported by her son, had a good claim of damages against his employers, through whose fault he met his death (*d*). 'The obligation of aliment and relief to parents in necessity is due both by the law of nature, and hath in it also that remuneratory obligation whereby children ought to retribute to, and recompense their parents for their education and entertainment' (*e*). The Court will always consider not only the necessities of the parent, but also the ability of the children; and the aliment awarded will vary according to the circumstances of each case (*f*). In a recent case, it was decided that if children have as their only property a contingent or reversionary interest in a fund yielding no immediate profits, they are not bound to sell it in order to afford aliment to an indigent parent (*g*). In the same case it was also decided, that a son who had only the pay of a lieutenant in the navy was not liable to aliment his father. The burden is imposed equally upon descendants in the same degree, provided all are able to afford it, unless one of them be an heir, and the others

(*a*) *Beatson*, 14 July 1836, 1 Swin. 254.

(*b*) *James Stevenson, jun.*, Jedburgh Circuit, April 1864.

(*c*) *Supra*, p. 85; Stair i. 5, 9; Bankt. i. 6, 20; Ersk. i. 6, 57; Wal. p. 280. *Brown* v. *his Sons*, M. 448 (1710); *M'Culloch* v. *M'Culloch*, 5 Sup. 376 (1778); *Seton* v. *Paterson*, M. 429 (1761); *Logan* v. *Campbell*, M. 428 (1758); *Anderson* v. *Gibson*, M. 427, 5 Sup. 273 (1754); *Ettrick* v. *Sword*, 14 Feb. 1824, 2 S. 715; *Spence* v. *Murray*, M. App. *v.* Aliment 1 (1796); *Campbell*, 25 Feb. 1809, F. C.; *Pringle* v. *Pringle*, 10 Dec. 1824, 3 S. 248; *Seaton* v. *Seaton*, M. 431 (1764); *M'Conochie* v. *M'Conochie*, 22 Feb. 1830, 8 S. 604, and 2 Jur. 260; *Muirhead* v. *Muirhead*, 15 Dec. 1849, 12 D. 356; *Mackenzie* or *Thom* v. *Mackenzie*, 2 Dec. 1864, 3 Macph. 177.

(*d*) *Weems* v. *Matheson's Representatives*, H. L. 31 May 1861, 4 Macq. 216.

(*e*) Stair i. 5, 9.

(*f*) See cases *supra* (*c*), particularly the case of *Pringle*.

(*g*) *MacDonald* v. *MacDonald*, 20 June 1846, 8 D. 830.

younger children, in which case the burden seems to lie solely upon the former (*a*). A distinction was drawn in a recent case between the case of a son succeeding to a fortune from his father or other ascendant, and the case of a son who has made his own fortune. In that case it was held, that a widow who had stipulated in her marriage contract for an annuity of £50 per annum in the event of her surviving her husband, was not entitled, when seventy-seven years of age, and having an income of £60 a year, to any additional aliment from a son, who had an income of £1500 a year besides a considerable fortune. The Lord Justice-Clerk observed: 'I should be sorry to say that the fact of children being in a wealthy position does not entail upon them an obligation *ex pietate* to maintain their parents in a manner proportionate to their means, merely because their wealth is the result of their own exertions. I do not desire to lay down any such principle; but I think, on the other hand, there exists a material distinction between the case of a child who has succeeded to means through his father, or some other near relative, and one whose wealth is the result of his own exertions, when a claim to aliment his mother is brought against him. The obligation in both cases rests on the same principle of filial piety, but it is much stronger in the one case than in the other; and I will add that, in the case in which the obligation is weaker, the party against whom it is sought to be enforced, is certainly entitled to exercise his own judgment and discretion a great deal more than in the other case, where he has succeeded to an inheritance. The question we have here to decide between parties so situated is, whether this lady, being in possession of £60 a year, which is £10 more than she could under her marriage settlement have expected to receive on her husband's death, is in such a state of comparative destitution, that a court of law can compel her son who has an income of £1500 a year to add to it. I do not think so' (*b*).

It is a point undetermined whether a son-in-law is liable in aliment to an indigent father-in-law or mother-in-law, in respect of his marriage to a daughter, whether *lucratus* or not. The point has never been decided in the Supreme Court, but in the Sheriff Courts con-

(*a*) Wall. p. 280; *M'Culloch* v. *M'Culloch*, *supra*.

(*b*) *Landers* v. *Landers*, 25 March 1859, 21 D. 706.

tradictory decisions have recently been given (*a*). The point arose directly for decision in the case of *Laidlaw* (*b*), where an action of aliment being raised by a mother against her son, it was sisted till his sister, the only other child, and her husband, were called. Defences were lodged in the case, but the judges, while they expressed opinions somewhat favourable to the claim, refused to decide the case, 'suggesting that it was extremely fit for extrajudicial arrangement among the parties themselves;' and a compromise was accordingly come to. In a prior case, where a father who had a decree against a daughter for £12 per annum was preferred to the creditors of her husband, the claim was constituted by decree before her marriage with the husband whose creditors claimed the preference (*c*). In the recent case of *Macdonald*, the claim was made *inter alios* by a father against three daughters and their husbands. These defenders pleaded that, being domiciled in England, their liability must be determined by the law of England; but the Court, while they delayed the case as to them in order to allow parties, if so advised, to obtain the opinion of English counsel as to their liability, expressed *obiter* their opinions against such a claim by the law of Scotland. The Lord President (Boyle) observed: 'The husbands of the daughters are not liable on any ground of law with which I am acquainted, and a decree against the married daughters themselves would be ineffectual. They have no separate estate.' Lord Mackenzie observed: 'As to finding the daughters liable, because they have husbands, viewing the husbands as a kind of estate, it is a thing I do not like to set the example of;' and to a similar effect the other judges. There is thus no authoritative decision fixing the point. But the *obiter dicta* of the Supreme Court in the most recent case are decidedly against the claim. To this it may be added, that in a case which came before Lord Ormidale when he was Sheriff of Renfrew, he was of opinion that no such liability existed, and rejected the claim (*d*). The principle upon which it is thought

(*a*) *M'Adam* v. *M'Adam* (Glasgow), 4 Feb. 1863, Scot. Law Mag. N. S. ii. p. 34; *Reid* v. *Hedderwick* (Glasgow), 21 Dec. 1863, *ibid.* iii. p. 9, decided affirmative; and *Crawford* v. *Morgan and Crawford* (Renfrew), 20 Oct. 1863, *ibid.* ii. p. 170, decided negative.

(*b*) *Laidlaw* v. *Laidlaw and Oliver*, 3 July 1832, 10 S. 745.

(*c*) *Spence* v. *Murray* (1796), M. App. Aliment 1.

(*d*) *Galbreath* v. *Galbreath*, 9 Jan. 1854, Scot. Law Mag. N. S. ii. p. 170.

that a son-in-law is not liable is, that while a husband is liable for the debts of his wife arising *ex contractu* before the marriage, and also for those which she contracts as *preposita* in household affairs after marriage, he is not liable for any claim arising *ex jure naturæ*. The claim of a mother or father against a child is of this latter class; and it is thought that, unless the parent has before the marriage become dependent on or is supported by the daughter, no claim in law exists against the husband on account of the supervening poverty of the parent.

The mode in which this obligation of aliment may be discharged has been already considered (*a*); and it is enough here to state that, in the general case, it is not a sufficient fulfilment of the obligation to offer to receive the claimant into the child's family. The Court will judge of such an offer according to the circumstances of each case; but unless it appear that the child is unable to afford a separate maintenance, they will not sustain it as sufficient. It seems to be otherwise when the claim of aliment is made not directly by the party, but as a claim of relief by a parish which has given aliment to a pauper (*b*). But where the children are very poor, and unable to afford maintenance to *both* their parents or other ascendants, Stair lays it down that the nearest is to be preferred, and the paternal line before the maternal; the father before the mother, etc. (*c*).

What court decides on the question of aliment.

The Court of Session was formerly the only competent court in which a question of permanent aliment could be raised (*d*). But it was enacted by 1 Will. IV. c. 69, s. 32, that 'actions of aliment may be instituted, heard, and determined in any Sheriff Court in Scotland.' Under this enactment any action of aliment, which does not necessarily involve a judgment on a question appropriate to the Supreme Court, may be brought in the inferior court. Actions of aliment by a wife against her husband fall within the exception (*e*); and the Sheriff cannot decern even for *interim* aliment in such cases, unless in very special circumstances (*f*). But unless

(*a*) *Supra*, pp. 91, 94.

(*b*) *Buie* v. *Stiven*, 5 Dec. 1863, 2 Macph. 208.

(*c*) Stair i. 5, 9.

(*d*) *Jackson* v. *Jackson*, 3 March 1825, 3 S. 610; *Whyte* v. *Whyte*, 10 March 1829, 7 S. 567.

(*e*) 1 Will. IV. c. 69, s. 33. Fraser, Husband and Wife, 2d ed.

(*f*) *Benson* v. *Benson*, 14 Feb. 1854, 16 D. 555; *Fraser* v. *Fraser* (Sheriff Court, Inverness), 8 Oct. 1856, 1 Shff. Ct. Dec. 154.

the right of the pursuer to aliment depends upon having *that* declared which it is not competent for the Sheriff to declare, the determination of the question of aliment falls properly under the jurisdiction of the Sheriff. There does not appear to be any decision of the Court of Session upon this point. But the practice in the Sheriff Courts is in conformity with this opinion; and in the case of *Buie* v. *Stiven* (*a*) the claim of aliment began in the Sheriff Court, and was ultimately determined by the Court of Session on advocation.

(*a*) *Supra*, p. 117.

CHAPTER V.

BASTARDS.

THE law holds as bastards all children who do not possess the status of legitimacy in any of the modes already detailed (*a*). The English term bastard is compounded of the Saxon words *base* and *start*, or *steort*, signifying a base or vile original (*b*). The law of Scotland imposes disabilities on all bastards, but more so on one class than upon another (*c*). Bastards are either incestuous and adulterous on the one hand, when conceived or born during the marriage of one of the natural parents; or spurious on the other, called also *vulgo quæsiti*, when born of promiscuous intercourse (*d*). The principal distinction between the two is this, that the latter may be legitimated *per subsequens matrimonium*, but the former (it is thought) never.

Disabilities of bastards.

I. It is the policy of law to discourage every other connection than that of marriage, by not acknowledging, as to any legal effect, the relations which spring from connections unsanctioned by marriage. The rights and privileges of husband and wife, of parent and child, it reserves for those who are known to the law in these relations. Bastards are therefore held in law to have no father (*e*), *presumptione juris et de jure;* and, in consequence, follow the status and domicile of the mother (*f*). There may be a mother without the solemnity of

(*a*) *Supra*, pp. 1 *seq.*

(*b*) Burns' Justice, art. Bastards, s. 1.

(*c*) The reasons why the laws have imposed such disabilities have been fully explained in Dr Croke's introduction to his report of the case of *Horner* v. *Liddiard.*

(*d*) *Vulgo concepti* dicuntur qui patrem demonstrare non possunt, vel qui possunt quidem sed eum habent quem habere non licet, qui et *spurii* appellantur.—Dig. i. 5, 23.

(*e*) 'The Lord Ordinary speaks of this boy's agnates, but I cannot allow such language. In a legal view, a bastard has no father, and can have no relations by the father. It is a solecism to say that a natural child has an agnate.'—*Per* Lord Hermand in *Goadby* v. *Macandys*, 7 July 1815, F. C.

(*f*) Lex naturæ hæc est ut qui nascitur sine legitimo matrimonio matrem sequatur nisi lex specialis

marriage; but there can be no father. *Mater semper certa est etiamsi vulgo conceperit; pater vero is est, quem nuptiæ demonstrant* (*a*). 'The relation between a father and his bastard child is not in any proper, civil or municipal, sense, the relation of parent and child. A bastard is in the eye of law *filius nullius*. Not only has he no father, but no proof can give him a father; nothing can do that, but marriage between his mother and his putative father. The bastard having no father, what is the relation of the man by whom paternity has been admitted, or against whom it has been proved? It is not a relation which creates reciprocal duties and obligations. The father has no right of custody of the bastard's person, or of administration of his estate; he has none of the characteristics of the *patria potestas*. The only relation is that the father is to a certain extent, and under certain conditions, liable to aliment the child' (*b*). The chief incapacity of bastards, in consequence of this base original, is, that they are themselves incapable of inheritance, except by special Act of Parliament; and that as they have no collateral kindred, seeing that by the law succession is only through the father, they have no heirs but of their own body, and any property which they may acquire, if they die intestate and without issue, devolves to the Crown (*c*). To the father's succession, whether of heritage or moveables, all lawyers are agreed that bastards can lay no claim; and as to the mother's *heritage*, the same rule holds, on the ground that the inquest cannot serve them *lawful* heirs to her. Some writers, however, maintain that, in conformity with the civil law, bastards are entitled to succeed to their mother in moveables, 'there being no doubt there of the propinquity of blood, which alone is considered in this case' (*d*); but Erskine, in the

aliud inducit.—Dig. i. 5, 24. Cum legitimæ nuptiæ factæ sint patrem liberi sequuntur; vulgo quæsitus matrem sequitur.—Dig. i. 5, 19; and authorities as in (*c*), *infra*.

(*a*) Dig. ii. 4, 5; Taylor's Civil Law, p. 270.

(*b*) *Per* Lord Justice-Clerk (Inglis) in *Corrie* v. *Adair*, 24 Feb. 1860, 22 D. 900.

(*c*) Craig ii. 18, 15; Stair iii. 3, 42 and 44, and iv. 12, 1; Bankt. i. 2, 4 and 6, and iii. 3, 99; Ersk. i, 6, 51, and iii. 10, 5; Balf. p. 239. *Murray's Relict* v. *King's Advocate* (1502), M. 1346; —— v. —— (1566), M. 1347; *Buchanan* v. *Campbell* (1601), M. 1353; *Sibbald* v. *Greig* (1612), M. 1354; *Halero* v. *Somervell* (1626), M. 1348; *Wallace* v. *Muir* (1629), M. 1347; *Corrie* v. *Adair*, *supra*.

(*d*) Bankt. i. 2, 4; Craig ii. 18, secs. 5, 10, 16; Stair iv. 12, 1.

most decided terms, has expressed a different opinion (*a*). Bastards, however, may take under express destination, and consequently may be heirs of tailzie or provision (*b*); they may also have heirs of provision, the maxim *quod bastardus non potest habere hæredem nisi de corpore suo legitime procreatum* applying to a legal heir, not to an heir of provision (*c*). If the bastard leave lawful issue, they succeed to him (*d*). Though the bastard die without issue, his widow is entitled to terce and *jus relictæ;* and only the remainder, after deducting these legal claims, and the bastard's debts, goes to the Crown (*e*).

Lord Stair treats of the Crown's right to the bastard's estate as arising from confiscation or escheat (*f*). But in several cases the principle of the right has been referred to succession, and the Crown regarded as heir (*g*); but this has been doubted (*h*). In an authoritative case (*i*), which was affirmed on appeal, it was decided that the Crown or its donator might reduce a deed of the bastard's *ex capite lecti.* In his report of the case, Kames remarks: 'It evidently appeared to me that the Court was here misled by an inaccurate expression. The king is named last heir, not that he is an heir in any proper sense, but only that he has a right *jure coronæ* to all goods which have no proprietor. Yet this expression was the only foundation of the judgment, which bestowed upon the king one of the most extraordinary privileges of the heir.' The judgment was however affirmed; and in a later case (*k*) the Court were unanimously of opinion that the point was settled by this case, and refused to hear any argument to the contrary. On the same principle, an adjudication against the Officers of State after the bastard's death, for a debt due by him, would be sustained (*l*). But with

(*a*) Ersk. iii. 10, 8.

(*b*) Craig ii. 18, 11, and ii. 16, 19; Stair iii. 3, 44; Bankt. i. 2, 4; *Innes* v. *Hay*, M. 1344 (1584).

(*c*) *Innes* v. *Hay*, *supra*.

(*d*) See *supra*, p. 120 (*c*); also *Dundas* v. *Moffat* (1546), and *Auld* v. *Millar* (1563), M. 1343.

(*e*) Balf. 237; Craig ii. 18, 15; Stair *ibid.*, and iv. 12, 3; Ersk. iii. 10, 5.

(*f*) Stair iii. 3, 42.

(*g*) *Begg* v. *Arnot*, M. 3182 (1741); *Goldie* v. *Murray*, M. 3183 (1753); *Brock* v. *Cochrane*, 2 Feb. 1809, F. C.

(*h*) More's Notes, p. xxxiv. No. 20.

(*i*) *Goldie* v. *Murray's Trs.*, *supra*.

(*k*) *Brock* v. *Cochrane*, *supra*. The same principle was assumed in a case as to a lease, though it was held that the Crown could not assign the lease, there being no mention made of assignees.—*Finlayson* v. *Hay* (1755), M. 1355.

(*l*) *Reid* v. *Officers of State*, M. 1355, Elch. *v.* Bastardy 1 (1747); More's Notes, *ibid.*

regard to the bastard's moveables, these cannot be taken up by any one, except in the form of a gift from the Crown, obtained in the Court of Exchequer; and so a decree of constitution of his debt, obtained by the bastard's creditor against the Officers of State, was held inept as a mode of attaching the moveables (*a*). In the time of Craig, bastards could hold no dignity or public office, such as that of judge; but this law is not repeated by any subsequent writer (*b*). Formerly, bastards could not make a testament, when they had no issue of their own bodies, without the Crown's letters of legitimation (*c*), though they might effectually dispose of their property by a general disposition, if it was not testamentary (*d*); but this disability is now removed by statute (6 Will. IV. c. 22). Bastards having lawful issue of their own bodies could always make a testament, and were entitled to appoint tutors and curators to their children (*e*).

Father's powers over bastard children.

II. The parental authority only extends to lawful children. A bastard being *nullius filius*, his father has no power or authority over him, any more than an ordinary stranger. The connection is entirely disavowed by the law as to any civil parental authority; the children are debarred from reaping any benefit in the matter of inheritance; and father and child are regarded as strangers (*f*). The only father to whom the law gives the *patria potestas* is the father *quem nuptiæ demonstrant;* and the only instances in which the natural father is acknowledged, are those to his disadvantage, in matters of civil concern; or by way of restriction, in such as are of a moral nature. He is compelled to aliment, and he is forbidden to marry his natural daughter. 'A bastard has in law no father; and the person so called is he who, from contact with the mother, is liable in the burdens of paternity without any of the privileges' (*g*). 'A natural father,' said Lord Stowell, 'in the language of the law, is only a father by repute of an illegal and disreputable character, —a character not of honour and reverence, but of discredit and shame.' 'I take it to be universally true, almost without any

(*a*) *Lawson* v. *Bowie*, 13 May 1829, 1 Jur. 177.

(*b*) Craig ii. 18, 16. See Bankt. i. 2, 5.

(*c*) *Supra*, p. 43.

(*d*) *Ewing* or *Glen* v. *Semple* (1739), M. 1352, and 5 Sup. 211.

(*e*) *Muir* v. *Kincaid* (1628), M. 16250.

(*f*) *Corrie* v. *Adair*, *supra*, p. 120.

(*g*) *Per* Lord Jeffrey in *Weepers* v. *Kennoway*, 20 June 1844, 6 D. 1173.

exception, that in all Acts of Parliament the title of *father* belongs only to him who becomes so in the manner known to and approved of by the law' (*a*). A natural father cannot therefore appoint a guardian to his bastard child (*b*).

Aliment of bastards.

III. The doctrine that a bastard has no father, is not allowed universal application; for seeing that, *de facto*, some person must have been the father, the law will make inquiry into this, in order to ascertain the persons liable to maintain him. The law of Scotland holds both the mother and father liable to aliment the child (*c*); and the question is generally raised by an action at the mother's instance against the father. 'It is a claim in which the child rather than the mother is at bottom the father's creditor; and the liability to contribute to its aliment is a liability which attaches by force of the law itself, and simply in respect of the birth and existence of the child, without the intervention of any act or proceeding whatever on the father's part, to constitute, in the statutory sense, a claim of proper debt against him' (*d*). The obligation of the father to aliment 'depends upon no principle of the civil law, or of the law of nations, but arises entirely *ex jure naturali*, and is one of those natural obligations to which the municipal law of this country has seen proper to give legal effect, on account of the natural justice on which it is founded' (*e*). But the mother is, as regards this claim of aliment, as much debtor to her child as the father; and her claim against the latter is truly a claim for rateable contribution or relief (*f*). In a recent case this matter was thus referred to: 'An action of filiation is not an action of aliment; it is an action of debt between the parents, concluding that the defender shall relieve the pursuer in part of that support which she is bound to give to her child' (*g*). So binding is this obligation on the mother, that

(*a*) *Horner* v. *Liddiard*, Croke's Report, p. 183.

(*b*) See *Johnston* v. *Clark*, M. 16374, Hailes (1785); *Wilson* v. *Campbell*, 10 March 1819, F. C. See *infra*, *v.* Guardian and Ward, Div. i. c. ii. ss. 1, 3, and 4.

(*c*) Bankt. i. 5, 64; Ersk. i. 6, 56.

(*d*) *Per* Lord Ivory in *Thomson* v. *Westwood*, 26 Feb. 1842, 4 D. 833.

(*e*) *Per* Lord Justice-Clerk (Inglis) in *Corrie* v. *Adair*, 22 D. 900.

(*f*) *Per* Lord Ivory in *Thomson* v. *Westwood*, 26 Feb. 1842, 4 D. 833; *Mathison* v. *Hay and Others*, 23 Dec. 1831, 4 Jur. 212. See an article in the Edinburgh Law Journal, vol. i. p. 627, as to the principle on which this obligation of aliment is based.

(*g*) *Per* Lord Neaves in *Buie* v. *Stiven*, 5 Dec. 1863, 2 Macph. 223.

her husband has been found liable in support of a natural child when she could not get funds from the father (*a*).

On the death of either parent leaving property, it has been once found, that the heir or executor succeeding to it is not liable to aliment the ancestor's bastard child (*b*); but this doctrine is in contradiction to the analogous rule applicable to legitimate children (*c*), and has been overruled by subsequent decisions (*d*). A grandfather is not bound to support a bastard grandchild (*e*). Failing the father and mother, the claim falls upon the parish where the mother has acquired a settlement; or (if the child were in the *father's* custody) where a settlement had been acquired by him (*f*). The claim arises against the parish when the mother is unable to support the child, and when her action against the father has been met by an offer to aliment the child in his own family, which, in the exercise of her legal rights, she has refused (*g*). If a grandfather or grandmother aliment a bastard on failure of the father and mother to do so, they are entitled to repayment from the parish (*h*). It has been said to be a competent procedure for the kirk-session to present a summary application against one who is admitted to be the father of a bastard, for his incarceration until he indemnify the parish of the past expense of supporting his child, and find security to keep the parish free of all such burden in future (*i*); but in order to justify the interference of the kirk-session, there must first be some demand made against the parish (*k*).

(*a*) *Aitken* v. *Anderson*, 1815, Hume 217.

(*b*) *Ker* v. *Moriston*, M. 1363 (1692). 'I can pay no respect to the decision in the case of *Ker*. It shows a very loose conception of what the law was in that olden time; but it has since been perfectly ascertained that such a claim as this is a claim of debt.'—*Per* Lord Ivory in *Clarkson* v. *Fleming*, 7 July 1858, 20 D. 1224.

(*c*) *Supra*, pp. 107 *seq.*

(*d*) *Nicol* v. *Heritors of Dundee*, 19 June 1832, 10 S. 670; *Scott* v. *Sharp* (1759), M. 440, and App. Parent and Child 1; *Clarkson* v. *Fleming*, *supra*.

(*e*) *Nicol* v. *Heritors*, *ibid.*; Dunlop, 370, s. 34; *Lumsden* v. *K.-S. of Leslie*, 18 July 1846, 8 D. 1251.

(*f*) *Robert* v. *Fife*, 5 Feb. 1825, 3 S. 500; *Rescobie* v. *Aberlemno*, M. 10589 (1801); *Edinburgh* v. *Brown*, M. App. *v.* Poor, No. 6 (1806); *Weepers* v. *Kennoway*, 20 June 1844, 6 D. 1166; *Lasswade* v. *St Cuthbert's*, 6 March 1844, 6 D. 637 and 956.

(*g*) *Weepers* v. *Kennoway*, *supra*.

(*h*) *Weepers* v. *Kennoway*, *supra*; *Lumsden* v. *K.-S. of Leslie*, *supra*.

(*i*) *Pollock* v. *Clark*, 12 Nov. 1829, 8 S. 1 and 7. The competency of this may be doubted.

(*k*) *K.-S. of Wigtown* v. *Dalziel* (1795), Hume 453; *Garvald* v. *Forrest*, 14 Feb. 1817, F. C.

By the Poor Law Act it has been enacted, that if the mother or putative father of a bastard refuse or neglect to maintain it, after the paternity has been established, whereby it becomes chargeable to the parish, they shall be punishable by fine and imprisonment (8 and 9 Vict. c. 83, s. 80). A discharge by the mother or the parish to the father of all claim for future aliment will not free the father from the obligation; though any right of relief competent to him against the parties who undertook the obligation in his place, will be reserved (*a*). Although the mother of an illegitimate child is bound equally with the father for aliment, it would appear that the father who has alimented it for one period, is not entitled on this to plead compensation against the mother for aliment during an equal period (*b*). The reason of this is, that the claim is truly not hers so much as the child's. Where the action is at the instance of the mother only, and for repayment of aliment expended on the child, compensation might be pleaded (*c*). If any stranger should aliment the child, he has an action of relief against the father, mother, and kirk-session (*d*). Where the aliment falls into arrear, the right to the arrears is not cut off by the triennial prescription (*e*); and accordingly in one case a mother recovered £300 of arrears, being aliment for thirteen years, from the father (*f*). Interest will be allowed on arrears (*g*). Although a claim for arrears does not fall under the triennial prescription, yet it may be held extinguished by long taciturnity, implying payment (*h*); but

(*a*) *Pott* v. *Pott*, 7 Dec. 1833, 12 S. 183; *A. B.* v. *C. D.*, 12 Feb. 1842, 4 D. 670; *M'Gill* v. *M'Gill*, 9 March 1784, not reported, Arniston Session Papers, Adv. Lib. vol. clv. No. 43. This also is the English law, *Cole* v. *Gower* (1805), 6 East 110.

(*b*) *Per* Lord Ordinary in *Arbuthnot* v. *Symon*, 15 May 1834, 6 Jur. 337, 12 S. 590.

(*c*) See *A. B.* v. *C. D.*, 12 Feb. 1842, 4 D. 670.

(*d*) *Mattheson* v. *Hay*, 23 Dec. 1831, 4 Jur. 212, 10 S. 183.

(*e*) *Finlayson*, 7 July 1809, F. C.; *Thomson* v. *Westwood*, 26 Feb. 1842, 4 D. 833; *Moncrieff* v. *Waugh*, 11 Jan. 1859, 21 D. 216. These cases overrule *Forsyth* v. *Simson* (1791), M. 11081.

(*f*) *Lamb* v. *Paterson*, 6 Dec. 1842, 5 D. 248.

(*g*) *Lamb*, *ibid.*; *Hill* v. *Gilroy*, 25 May 1821, 1 S. 33; *Pott* v. *Pott*, 7 Dec. 1833, 12 S. 183; *Moncrieff* v. *Waugh*, *supra*.

(*h*) *Arbuthnot* v. *Symon*, 22 May 1834, 6 Jur. 337, and 12 S. 590. 'The plea of taciturnity is often misunderstood and pleaded where there is no foundation for it, except silence for a length of time; but silence in itself is not taciturnity. In order to found the plea, the relation of the parties and the whole surrounding circumstances must be considered; and unless these, coupled with silence, are suffi-

this, of course, will not hold where payment is not averred *habili modo* (*a*). A party incarcerated on a decree for aliment may obtain the benefit of *cessio* (*b*).

Amount.

In judging of this question, the rank of the parents has no influence on the decision. It has now been authoritatively settled, with regard to a lawful child, that he is entitled to no more aliment than 'support beyond want,' whatever be his father's rank (*c*); and the same principle is clearly applicable to a bastard (*d*). The sum which the Court have, in comparatively old cases, considered sufficient as due from both parents for the support of an illegitimate child, has varied from £6 stg. to £100 Scots, one-half of which the father was decerned to pay (*e*). A father in the middle ranks was found liable in £20 annually (*f*), and one in the higher ranks in £50 (*g*). But these precedents have not been followed in modern practice, which has confined the aliment merely to what is sufficient to afford the bare necessaries of life. In a recent case, the Court seemed to consider a decree for £7 against the man to be rather large, though they refused to alter the Sheriff's judgment for that amount (*h*).

Duration of aliment.

The general rule is, that the aliment will be due until the child be able to earn a subsistence for himself; but in the application of this rule, the decisions have varied according to the circumstances of each case. With regard to boys, the aliment in some cases has been given until the age of seven (*i*); in others till ten (*k*); in others till twelve (*l*); in others till fourteen, the age to which the

cient to infer a presumption of payment, satisfaction, or abandonment, there is no ground for the plea.'—*Per* Lord Justice-Clerk (Inglis) in *Moncrieff* v. *Waugh*, *supra*.

(*a*) *Thom* v. *Jardine*, 24 June 1836, 14 S. 1004.

(*b*) *Cassels* v. *Melville*, 27 Nov. 1852, 15 D. 124.

(*c*) *Maule* v. *Maule*, 9 July 1823; revd. 1 June 1825, 1 W. S. 266.

(*d*) But see *Lamb* v. *Paterson*, *ut supra*.

(*e*) *Lamb*, *ibid.*; *Short* v. *Donald*, M. 442 (1765); *Caldwell* v. *Stewart*, 5 Sup. 390 (1773); *Scott* v. *Oliver*, 5 Sup. 390, M. 444 (1778); *Paterson* v. *Spiers*, M. 445 (1782); *Arnot* v. *Thomson*, 25 Feb. 1826, 4 S. 503; *M'Dowall* v. *M'Lurg*, M. App. *v.* Prescript. 6 (1807).

(*f*) *Robison*, 1 July 1815, not rep.

(*g*) *Anderson* v. *Farquharson*, 23 May 1805, not reported.

(*h*) *Patrick* v. *Goodwin*, 26 Nov. 1845, 8 D. 138.

(*i*) *Paterson* v. *Spiers*, M. 445 (1782).

(*k*) *Scott* v. *Oliver*, M. 444, 5 Sup. 390 (1778); *Ballantyne* v. *Malcolm*, Hume 425 (1803); *Arnott* v. *Thomson*, 25 Feb. 1826, 4 S. 503.

(*l*) *Clarkson* v. *Fleming*, 7 July 1858, 20 D. 1224.

institutional writers extend it (*a*). With regard to girls, there are decisions which fix the period at ten (*b*); but the general opinion is, that it ought to be granted till puberty, or twelve years of age (*c*). There can, however, from the nature of the thing, be no precise age fixed as an inflexible rule, as one child may be able to work sooner than another; and the aliment will be claimable during the child's entire life, if it be physically or mentally incapable of supporting itself (*d*). The practice is, to give the aliment until the age of seven or ten, under reservation of a right to apply for an extension of it, on due cause being shown (*e*).

Inlying expenses, medical attendance to child, etc., and education.

Besides aliment, the woman is entitled to a sum for inlying charges, which also has varied in amount (*f*). In peculiar cases, the Court have allowed a claim against the father for medical attendance and school-fees; thus, in truth, imposing upon the fathers of illegitimate children the peculiar obligations incumbent on the fathers of lawful offspring (*g*).

Obligations of bastards to aliment their parents.

It is unsettled whether a bastard is liable in aliment to his parent. Pothier holds that the obligation exists (*h*). Baron Hume says, that 'there is no obligation on a natural child to aliment his reputed father; at least it is an extremely doubtful question. The contrary holds with respect to the mother (*i*), however, whom the child is always bound to support, if she be in indigent circumstances' (*k*). Heineccius states the Roman law to be, that both

(*a*) *Graham* v. *Kay*, M. 441 (1740); Ersk. i. 6, 56; Bell's Prin. 2062; *Lamb* v. *Paterson*, 6 Dec. 1842; *Wilson* v. *Bowie*, 1810, Hume 426; *Ballantyne* v. *Malcolm*, *supra*.

(*b*) *Glendinning* v. *Flint*, M. 445 (1782); *per* Lord Ordinary in *Arbuthnot* v. *Symon*, 22 May 1834, 6 Jur. 337, 12 S. 590.

(*c*) Bell's Prin. 2062; Bell's Dict. *v.* Aliment of Bastards; M'Glashan on Aliment, p. 68. In *Short* v. *Donald* (1765), M. 442, aliment was given for a female child till the age of fourteen.

(*d*) *Marjoribanks* v. *Amos*, 30 Nov. 1831, 10 S. 79; *Finlayson* v. *Govan*, 7 July 1809, F. C.; *Pott* v. *Pott*, 7 Dec. 1833, 12 S. 183; *Anderson* v. *Lauder*, 11 March 1848, 10 D. 961, 2 Hutch. 249.

(*e*) Cases of *Ballantyne*, *Glendinning*, *Wilson* v. *Bowie*, and *Clarkson*, *supra*; *dictum* in *Corrie* v. *Adair*, 24 Feb. 1860, 22 D. 897.

(*f*) Bankt. i. 5, 64; *Short* v. *Donald*, M. 442 (1765), and cases cited last section.

(*g*) *Lamb* v. *Paterson*, *ut supra*.

(*h*) Pothier Œuvres, 4to ed., vol. iii. p. 314.

(*i*) See effect given to this in two Sheriff Court cases: *Inveravon* v. *Raeburn*, 1856, 1 Shf. Ct. Dec. 192; *Taylor* v. *Spottiswoode*, 1857, 2 Shf. Ct. Dec. 31.

(*k*) MSS. Lectures. See contrary, *Anderson* v. *Lauder*, 11 March 1848, 10 D. 961, 2 Hutch. 249.

parents were entitled to aliment from the bastard child (*a*), but one of his texts expressly contradicts this (*b*). As regards the father, Lord Cuninghame was of opinion that there was no such claim in law (*c*); and an opinion to the same effect was expressed by the Lord Justice-Clerk (Inglis) (*d*).

Custody of bastards.

IV. Though the father is entitled to the custody of his lawful children from their birth, a different rule applies to bastards (*e*). He has no right to claim the custody of them, except as hereafter stated. The law gives the mother (*f*) the custody of these children; and her claim for aliment could not be barred by an offer on the part of the father to take the child into his own keeping, seeing that this would be taking the custody from that parent to whom the law has given it (*g*). 'In the case of *Weepers*, the mother of a natural child, an infant at the breast, was not bound to accept the father's offer to take the child home. That was an offer to violate one of the first principles of the law of this country, founded on the law of nature, which declares most emphatically that a child of such tender years shall not be separated from its mother, the power of custody of the mother at that tender age being absolute. That, therefore, was no offer at all, because not only was the mother not bound to accept it; but if she had accepted it, she would have violated both her natural and legal obligations' (*h*). It has been said, that as custody implies guardianship, and as a bastard has no father in the eye of law, the mother's right even to the *permanent* custody of the child is clear; and that the father can at no age force the child from the mother otherwise than by refusing to pay aliment

(*a*) Heinec. Com. Pand. Pars iv. No. 267.

(*b*) Dig. xxv. 3, 4, 4.

(*c*) *Anderson* v. *K.-S. of Lauder*, 11 March 1848, 10 D. 961.

(*d*) *Corrie* v. *Adair*, 24 Feb. 1860, 22 D. 897.

(*e*) 'The father has the custody of his lawful but not of his natural children: so say the civilians; and there is good sense and good law in the doctrine.'—*Per* Lord Hermand in *Goadby* v. *Macandys*, 7 July 1815, F. C. See *Watson* v. *Keay*, 19 Feb. 1825, 3 S. 561.

(*f*) *Kidston* v. *Smith*, 1778, 5 Sup. 390.

(*g*) *Weepers* v. *Heritors of Kennoway*, 20 June 1844, 6 D. 1166; *Burges* v. *Halliday*, M. 1357 (1758). In the first, the mother having brought an action against the father, and been met by an offer to receive the child into his family, was found entitled to relief from the parish. In the second, the father's offer to receive the child—an infant—into his family was not sustained.

(*h*) *Per* Lord Justice-Clerk (Inglis) in *Buie* v. *Stiven*, 5 Dec. 1863, 2 Macph. 223.

after the particular period fixed by the Court (*a*). It is undoubted, that where after that period the mother is unwilling to aliment the child wholly herself, the father may demand possession of it. 'The father is not entitled to demand the custody of the child; he has no right of any kind as regards the child. He is under an obligation, and nothing else; he is under a liability to aliment the child, but is entitled to discharge that liability in the manner least burdensome to himself' (*b*). If, therefore, he offer to take the child into his own house, and there bring it up, the mother is not entitled to refuse the offer, and at the same time to claim aliment. She cannot be forced to deliver it up; but if she keeps it, she has no claim for its maintenance against its father. It has been already seen, that there is no invariable period during which the Court will compel the father to pay aliment; and therefore every question as to the time when he may demand the custody must be regulated by circumstances (*c*). In some cases he may do so at a very early age, if his object be to teach it a trade, or to put it in a position for acquiring a subsistence (*d*). It has been held, that the mother is entitled to the custody of daughters till they are ten years of age (*e*); and of sons till they are seven or ten (*f*), though in peculiar cases, as where the father has denied the paternity, the period will be extended to twelve or fourteen, or the custody will be refused altogether (*g*). Where a natural son had reached his twelfth year, it was held that the father, if called on to provide for him, was entitled to the custody (*h*). If the mother maltreat the child, or (it is

(*a*) Ivory's note, Ersk. i. 6, 56. See English rule, *Strangeway* v. *Robinson*, 4 Taunt. 498.

(*b*) *Per* L. Justice-Clerk (Inglis) in *Corrie* v. *Adair*, 24 Feb. 1860, 22 D. 900.

(*c*) 'It is clear, that during the infancy of a child the mother is entitled to the custody of it; but after the age of seven if a boy, and of ten if a girl, if no delicacy is alleged to exist, the father, on aliment being demanded, is entitled to meet that demand by an offer to take the child into his own house, or to make other arrangements for its aliment.'—*Per* Lord Cowan in *Corrie* v. *Adair*, *supra*.

(*d*) *Kay*, as in (*f*).

(*e*) Bell's Prin. s. 2062; 2 Hutch. Just. 262; *Glendinning*, *supra*.

(*f*) *Oliver* v. *Scott*, M. 44¾ (1778), 'till seven, and thereafter till either that the father shall take the child into his own keeping, or that the child shall attain the age of ten years.' *Kay* v. *M'Laurin*, 14 June 1826, 4 S. 706; Bell's Prin. 2062; Hutch. *ut supra*; M'Glashan on Aliment, 91; *Ballantyne* v. *Malcolm*, Hume 424 (1803); *Wilson* v. *Bowie*, Hume 426 (1810).

(*g*) *Caldwell* v. *Stewart*, 5 Sup. 390 (1773); *Keay* v. *Watson*, 19 Feb. 1825.

(*h*) *Rankine* v. *A. B.*, 16 May 1833, 5 Jur. 362; *Pott* v. *Pott*, 7 Dec. 1833, 12 S. 183. See *Ballantyne*, *ut supra*.

thought) if she enter into a marriage, the father may demand the custody of it from her (*a*). But although the father be married and have a family, this does not bar his right to the custody in those cases where, according to the rules just stated, he may demand it (*b*). The claim for the custody of the child must be distinctly intimated to the mother; and when she resides at a distance, proper arrangements must be made by the father for the transit of the child to his house, otherwise his liability remains (*c*). As the father's right to the custody of a natural child thus arises entirely in defence against a claim for aliment, he has in general no right to insist in an action for the custody of the child; but it is thought that in special circumstances he would be *in titulo* to apply to the Court for the protection of the child.

Questions as to custody where father is dead.

Questions as to the custody of natural children frequently arise between the mother and the father's trustees after his death. It is settled law, that a father is not administrator of his bastard child, nor can he appoint tutors and curators to him; but if he leave property to the child, the latter must take it with all the conditions annexed to it (*d*); and where there is no such bequest, the Court will determine the question of custody according to the peculiarities of each case. In general, when the child is in its infancy, the Court will leave it with the mother, however mean be her rank, and however great its fortune. But when it has passed the age of seven, it will be taken from the mother and delivered to the trustees to be educated in a manner befitting its future fortune (*e*). But although the father's trustees, thus holding funds for the child's behoof, are entitled to the custody, with a view to its suit-

(*a*) *Whitson* v. *Speid*, 28 May 1825, 4 S. 42; *Fairweather* v. *Lyall*, 23 May 1826, 4 S. 614; but not if child a mere infant,—*Burges* v. *Halliday* (1758), M. 1357.

(*b*) *Ballantyne* v. *Malcolm*, Hume 424 (1803).

(*c*) *Wilson* v. *Bowie*, 1810, Hume 426.

(*d*) *Infra*, Guardian and Ward, Part i. Div. i. c. ii. s. 3.

(*e*) Contrast these cases: *Hunter* v. *Speid*, 2 Dec. 1820, F. C.; *Whitson* v. *Speid*, 28 May 1825, 4 S. 42. In the former of these, tutors appointed by the father, who had left a large fortune to the children, were found not entitled to remove a child of six years old from the mother, who was married; but the child having attained the age of eleven, they were in the latter preferred. The question considered by the Court always is, What is best for the child, and most for its advantage? *Per* Lord Justice-Clerk and Lord Glenlee in *Whitson* v. *Speid*. See also *Baxter* v. *Dougal's Trs.*, 5 July 1825, 4 S. 139.

able education, the father's relations, merely *quâ* such, have no right to it, although the child have even attained the age of twelve (*a*).

What court decides as to the custody.

The protection and guardianship of infants is the peculiar province of the Court of Session, as the Supreme Court of Equity; and to that Court must application be made in regard to all questions as to the custody of bastards. The Sheriff has power to decide as to their temporary custody, where any sudden contingency prevents an application to the proper court (*b*). Actions of filiation and aliment are usually commenced in the Sheriff Court; and when stated as a defence to such an action, the Sheriff of course has jurisdiction to determine on an offer to receive into the father's family.

How the paternity is proved.

V. Where the paternity is denied, the woman brings an action for aliment against the alleged father; and in this action a proof is allowed her, that the defender is the father of her child. Prior to the Evidence Act, the first step generally adopted in processes of this kind was for the judge, on the motion of the woman, to order the man to be judicially examined. This is a step which is sometimes though rarely resorted to in ordinary actions. In the civil action for the aliment of a bastard child, the Sheriff Courts have permitted the judicial examination of the defender in order to ascertain the paternity. Lord President Boyle declared it in one case 'to be a perfectly competent procedure' (*c*), as it unquestionably is one which has been long in use, and is permitted by Act of Sederunt (*d*). The Lord Justice-Clerk Hope, however, in several cases condemned the practice with regard to declarations at the beginning of the suit (*e*). In a recent case it was held to be still a competent

(*a*) *Goadby* v. *Maccandys*, 7 July 1815, F. C. This case involved a nice question, as to whether the Court ought to give the custody of a child to the mother, who was an Englishwoman, and avowed her intention of removing the child from Scotland. Considerable hesitation was felt by some of the judges, but the majority of the Court sustained her right; and all were agreed that but for this she had the only right of custody. See Ivory's note to Ersk. i. 6, 56; opinions of Court in *Corrie* v. *Adair*.

(*b*) *Goadby* v. *Maccandys*, *ibid.*; *Speid* v. *Webster*, 18 Dec. 1821, 1 S. 221; M'Glashan on Aliment, p. 93. But see *infra*, *v.* Guardian and Ward, Part i. Div. ii. c. 2; also *Laing* v. *Laing*, 30 Mar. 1849, 11 D. 1217, and *sup.*, p. 81.

(*c*) *Kerr* v. *Hamilton*, 8 Feb. 1842, 4 D. 624.

(*d*) A. S. 10 July 1839, sec. 66.

(*e*) *Kirkpatrick* v. *Donaldson*, 2

procedure. 'The Evidence Act changed the law considerably, by allowing the parties to be examined as witnesses. But the old method is not abolished, and it is still quite competent to order the judicial examination of the party, to hold him as confessed if he fails to appear, and thereupon, with the oath in supplement of the pursuer, to hold the paternity proved' (*a*). Since the passing of the Evidence Act, the usual course is to allow parties a proof of their averments (*b*).

Semiplena probatio.

Before the Act allowing parties to a cause to be examined as witnesses, the woman was not bound to establish her case by the evidence required to prove a fact in any other action. The nature of the suit rendered it necessary to hold as sufficient, a *semiplena probatio*, with the woman's oath in supplement. To exact direct proof, and apply the maxim *actori incumbit probatio*, would, it was thought, be too strict, and would leave a multitude of bastards to be maintained by the mothers, or rather by the parish, seeing that in almost every case it would be quite impossible to bring full legal proof of such a secret fact. By our law, therefore, a middle rule was adopted, loose enough, but still reasonable, that of allowing the woman's oath after *semiplena probatio*,—that is to say, just enough proof to show that the woman was not naming a false father at her pleasure. She was allowed her oath in supplement, if she proved intercourse likely to have been the cause of her child's birth, and likely to have been continued down to the time when the child must have been begotten (*c*). She was also allowed her oath in supplement, if she proved connection within the period of gestation, if there were prior opportunities of intercourse, at a time corresponding to the birth of the child (*d*). 'The view which the Court used to take was this, that, where intercourse was admitted by the defender, although not at the exact time appropriate to the conception, yet not far from it, whether before or after, that admission might afford good ground

June 1843, 5 D. 1104. See also *Brown* v. *Wilson*, 15 Jan. 1842, 4 D. 392; *Patrick* v. *Goodwin*, 26 Nov. 1845, 8 D. 138.

(*a*) *Per* Lord President (M'Neill) in *M'Kellar* v. *Scott*, 8 Feb. 1862, 24 D. 499.

(*b*) 16 and 17 Vict. c. 20 (1853). *Scott* v. *Chalmers*, 2 Dec. 1856, 19 D. 119; *M'Bayne* v. *Davidson*, 10 Feb. 1860, 22 D. 739. See in Sheriff Court, *Henderson* v. *Milne*, 26 Feb. 1857, 2 Shf. Ct. Dec. 55.

(*c*) *Per* Lord Mackenzie in *Kerr* v. *Hamilton*, 8 Feb. 1842, 4 D. 624.

(*d*) *Petrie* v. *Robertson*, 22 Dec. 1825; *Lawson* v. *Eddie*, 18 May 1861, 23 D. 876.

for regarding the proof led by the pursuer as a sufficient *semiplena probatio* to admit her oath in supplement' (*a*). What constitutes *semiplena probatio* has been thus described by Lord President Blair: '*Semiplena probatio* did not mean merely a suspicion; suspicion depends on the turn of mind of the person who suspects, some persons suspecting wherever there was possibility. But a *semiplena probatio* must amount to such evidence as induces a reasonable belief, though not complete evidence' (*b*). This doctrine having been questioned by the Lord Ordinary in an important case, the Court confirmed it, observing at the same time, that 'this opinion has been oftener quoted, and been the foundation of more judicial decisions, than any other opinion that ever was delivered' (*c*). 'What is *semiplena probatio*, must be judged of according to the circumstances of each case. The only rule that can be laid down is, that *semiplena probatio* is evidence on which you can rely amounting to almost complete proof, and the oath is just to fill up any little deficiency that may exist therein. Nor do I say that persons of character such as this pursuer, or even common prostitutes, are not to be admitted' (*d*). 'I do not think it reasonable to say, that *semiplena* proof must always come up to a certain precise amount of proof, without any consideration of the person who raises the action' (*e*). The oath in supplement is allowed to supply defects in an otherwise consistent statement, not to cast the balance in a case of contradictory evidence and facts (*f*). The assumption in every case of *semiplena probatio* is, that the material fact is not so proved, that a verdict or judgment as on a thing proved could be given; and the difficulty is to say, what shall be taken as a sufficient half proof agreed to by the law, on considerations of necessity and expediency, to be taken as effectual for admitting the oath of the one party to complete the evidence, instead of leaving it, as in other cases, to the party making the claim, to prove an incomplete

(*a*) *Per* Lord Cowan in *Ross* v. *Frazer*, 13 May 1863, 1 Macph. 783.

(*b*) *Craig* v. *Crighton*, 14 June 1809, F. C.

(*c*) *Kirkpatrick* v. *Donaldson*, 2 June 1843, 5 D. 1104; and *per* Lord Gillies in *M'Crone* v. *Bell*, 9 June 1831, 9 S. 692.

(*d*) *Per* Lord President (Boyle) in *Mann* v. *Forrest*, 26 June 1850, 12 D. 1090.

(*e*) *Per* Lord Mackenzie, *ibid.*

(*f*) *Per* Lord Justice-Clerk in *Bruce* v. *Petrie*, 20 Nov. 1841, 4 D. 49.

case by the oath of the adversary (*a*). The evidence, apart from that of the woman, will be narrowly scanned; and if the witnesses are all persons of bad character, convicted of crime, or leading an immoral and abandoned life, the Court will consider what weight is to be given to such testimony. In such a case, the *semiplena probatio* was held not to be established (*b*); and where the evidence of the pursuer under the new system is only supported by such witnesses, the effect to be given to it will be judged of in the circumstances of the case.

There are a multitude of cases reported, in some of which *semiplena probatio* was found established, and in others not. It would serve no good purpose to detail these here, as no one case can be a precedent for another. 'I cannot,' said Lord Gillies, 'see the use of quoting former cases, where the facts were held to be or not to be a *semiplena probatio*, as fit to govern our judgment here. The facts of one case can never be identical with those of another; and where these vary, each successive case is truly a new one, and must be tried by itself' (*c*). There are, however, a few points of general application, settled by the decisions. An extrajudicial admission of the paternity by the man, is of the highest importance; and in a case where the whole evidence consisted in his having said, in a conversation regarding the woman, 'that others had to do with her as well as he,' and where the parties had opportunities of being together, the Court allowed the woman's oath in supplement (*d*). It is enough for the woman's plea, that she prove that the man had carnal connection with her about the time when the child was conceived; and it would not bar her claim, though at the same period she had connection with other men (*e*). The

(*a*) *Glendinning* v. *Flint*, 17 Jan. 1835, 13 S. 270.

(*b*) *Mann* v. *Forrest*, 26 June 1850, 12 D. 1090.

(*c*) *M'Crone* v. *Bell*, 9 June 1831, 9 S. 690; and *per* Lord Justice-Clerk in *Glendinning* v. *A. B.*, 17 Jan. 1835; and *per* Lord Moncreiff in *Brown* v. *Wilson*, 15 Jan. 1842, 4 D. 392.

(*d*) *Simpson* v. *Ross*, 3 June 1841.

(*e*) *Caldwell* v. *Stewart*, 5 Sup. 390 (1773); *Hagart* v. *Croll*, 31 May 1836, 14 S. 852; *Lawson* v. *Eddie*, 18 May 1861, 23 D. 876; Bell's Prin. 2061; Wall. 296; M'Glashan on Aliment, p. 71. In *Scrimgeour* v. *Stewart*, 17 Feb. 1864, 2 Macph. 667, it was held that it was not incumbent on the pursuer to prove that no other man but the defender had to do with her at the time of conception. Bankton thought otherwise, i. 6, 19. In such circumstances, would the man have relief against the other men? It was so found in *Caldwell*, 5 Sup. 390; but in *Lawson* v. *Eddie* it was better laid

woman was allowed to depone in supplement, where the man at first paid her 20s., and afterwards £20, on condition of her granting a written declaration that he was not the father (*a*); and the same judgment was given, though there was no evidence of undue familiarity, but the man had made application for a medicine to give to the woman to procure abortion (*b*); these circumstances being, in truth, admissions of the paternity. Mere *opportunity* of carnal intercourse does not amount to *semiplena probatio* (*c*). The condition of the alleged father, and his rank in life, will be taken into consideration in judging of a defective proof; for if he were a married man, or an elder in the church, these circumstances would be held as in his favour; because, to the ordinary motives for abstaining from guilt, there are superadded, in such cases, others of a powerful nature, which it is not easily to be believed could be overborne (*d*). Although the mother be married to another man than the alleged father, yet the child may be proved a bastard, and the paramour amerced in the aliment; but the right of the child to vindicate his legitimacy at any time will be reserved (*e*). Though the mother declare in the most solemn manner, even before kirk-sessions, that one man is the father of her child, while she afterwards raises an action, and makes out a clear *semiplena probatio* against another, she will be allowed her oath in supplement against the latter, notwithstanding her inconsistent statements (*f*).

It sometimes happens that the man, in his judicial *declaration*, admits sexual intercourse with the mother, but cautiously refers it to a period more than ten months or less than six before her delivery; or it may be proved that at such periods carnal connection took place. In such cases, the Court will consider the

down, that the other men were not there to defend themselves, and that the Court could only take up the case of the defender then before them.

(*a*) *M'Kenzie* v. *Smith*, 23 Dec. 1826, 5 S. 189.

(*b*) *Low* v. *Bayne*, 25 Jan. 1840, 2 D. 470.

(*c*) *Bowie* v. *Robertson*, 1 Dec. 1808, F. C.; *Kirkpatrick* v. *Donaldson*, 2 June 1843, 5 D. 1104.

(*d*) *Martin* v. *Smith*, 17 May 1834, 12 S. 604; *Kirkpatrick*, *ut supra*.

(*e*) *Jobson* v. *Reid*, 19 Jan. 1830, and 31 May 1832, 10 S. 594. 'In such a case the proof must be more pregnant than in other cases.' *Cantley* v. *Robertson*, 12 June 1834, 12 S. 725.

(*f*) *Greig* v. *Morrice*, 20 Jan. 1838, 16 S. 338; *Smith* v. *Boyle*, 30 May 1840, 2 D. 994. See *Martin* v. *Smith*, 17 May 1834, 12 S. 604; *Lawson* v. *Eddie*, 18 May 1861, 23 D. 876. See *Robertson* v. *Allan*, 1777, 5 Sup. 555.

situation and circumstances of the parties at the period when, according to the ordinary laws of gestation, the child must have been conceived; and if these were such as afforded them the same temptations and opportunities of meeting that they had before,—as, for instance, in the case of master and servant, or fellow-servants in the same family, or lodgers in the same house, or frequent visitors,—the presumption is, that the parties then had intercourse; and this presumption has weight to allow the woman under the old law her oath in supplement, or under the law as now administered, to give corroboration to her evidence given in the cause. These principles were not recognised till a late period (*a*), but they are now fully established by several cases, where the proof or the man's admission showed connection either beyond or within the ordinary period of gestation; but the woman's oath, notwithstanding, was allowed, because there was *opportunity* of connection at the proper period, and no sufficient reason was shown why it could not then have taken place (*b*). The proof or admission in one case was connection eleven months and three weeks prior to the delivery (*c*); in another, fourteen months (*d*); in another, one year and fourteen days (*e*); in another, seven months and four days (*f*); in another, eleven months and fifteen days (*g*); in another, six months (*h*); and in all these cases, a *semiplena probatio* was held established, as there was opportunity of connection at such a time as, according to the ordinary gestation, would have produced the child. The ground of decision in such cases was in one case (*i*) stated to be, 'that the rule of law with regard to the filiation of a bastard child, where the defender admits having had connection with the mother, is somewhat analogous to that which holds as to the legitimacy of a

(*a*) See *Stewart* v. *M'Kean*, and *Jack* v. *Copland*, 5 Sup. 554 (1774). In both cases the women seem to have been of bad character.

(*b*) *Leckie* v. *Lindsay*, and *Pratt* v. *M'Lean*, Feb. 1810, Hume, p. 33, and cases following.

(*c*) *Wightman* v. *Tomlinson*, Hume, p. 33, and M. App. *v.* Proof 5 (1807).

(*d*) *Brown* v. *Smith*, Hume 32 (1799).

(*e*) *Hunter*, 24 May 1814, F. C. But see opinion of Lord Craigie on this case in *Humphrey* v. *Aitken*, 1 Shaw Ap. Ca. 111.

(*f*) *Elliott* v. *Scott*, Hume 33 (1800).

(*g*) *Kerr* v. *Hamilton*, 8 Feb. 1842, 4 D. 624.

(*h*) *Petrie* v. *Robertson*, 22 Dec. 1825, F. C.

(*i*) *Petrie* v. *Robertson*, *supra*.

child born in matrimony, viz. that the time of the commencement of the connection will be carried as far back as necessary, or as the circumstances of the case render possible.' The same principles have been applied in recent cases (*a*). The rule of law, with the necessary caution with which it must be applied, has been thus elucidated: 'The rule which has been referred to is not a presumption of law, but only a presumption of fact. There is a presumption of law that married persons, with opportunity of intercourse, have had that intercourse, so as to sustain the legitimacy of the child under the maxim *pater est quem nuptiæ demonstrant.* But in a question as to the paternity of an illegitimate child, there is no presumption of law, but only a reasonable inference, from the proved frailty of both parties on one occasion, that if the circumstances occur again which led to intercourse before, the parties would take the same advantage of them. There is also a great difference between connection anterior to the conception of the child, and connection afterwards. In the first case, there is great reason to suppose that the connection has been repeated. But in the other case, if there is any reason for suspecting that the woman, after having become pregnant in consequence of connection with one man, immediately pays attention to another, I should not think that subsequent connection between them should necessarily be carried back so as to presume the paternity of a child conceived anterior to the connection proved. But in such a question everything depends upon the evidence' (*b*). But where opportunity is wanting at the proper period, as if it be proved that the man was not then in the country, an extraordinary gestation will be negative of a *semiplena probatio* (*c*). Nor will the presumption hold, if it be proved that the parties met for the first time a few months (within the ordinary period of gestation) before the birth (*d*). What is the proper period of gestation, has been considered in treating of legitimate children (*e*).

(*a*) *Lawson* v. *Eddie*, 18 May 1861, 23 D. 876; *Ross* v. *Frazer*, 13 May 1863, 1 Macph. 783.

(*b*) *Per* Lord Neaves in *Ross* v. *Frazer*, *ut supra*.

(*c*) *Paul* v. *Gilmour*, 4 Dec. 1824, 3 S. 368; *per* Justice-Clerk in *Petrie* v. *Robertson*, 22 Dec. 1825, F. C.; *Boyd* v. *Kerr*, 17 June 1843, 5 D. 1213.

(*d*) *Burns* v. *Cumming*, 27 June 1846, 8 D. 916; *Ritchie* v. *Cunninghame*, 12 Nov. 1857, 20 D. 35.

(*e*) *Supra*, pp. 11 *seq.*

Oath in supplement.

If the Court held that a *semiplena probatio* was established, an interlocutor was pronounced, allowing the woman to give her oath in supplement of her defective proof. She then appeared as a witness in the cause; and the proper mode of examining her was to put special interrogatories first, and conclude with the general question, 'whether the defender be her child's father.' But though this be the correct procedure, yet the general question, though put first, did not bar the other party from putting special interrogatories to elicit the truth. This is not the same as an oath on reference (*a*). *M'Naughton's* case fixed that a woman giving her oath in supplement is truly just another witness in the cause. 'It was the deliberate opinion of the Court, that when an oath in supplement is allowed, the party is in the situation of an additional witness' (*b*). Wherever the oath thus emitted is contradictory of the *semiplena probatio* in the special facts deponed to, the defender will be assoilzied, though the general question be answered in the affirmative (*c*). If the woman died before giving her oath, the whole case is at an end; and her solemn declaration to her own mother on deathbed was not allowed to supply the place of the oath in supplement (*d*). After a woman has given her oath in supplement, she cannot be judicially examined (*e*). Where there has been delay in bringing the action, this circumstance, unless the evidence other than her own oath be very satisfactory, will militate strongly against the pursuer (*f*). Under the Personal Diligence Act (1 and 2 Vict. c. 86), imprisonment for sums under £8, 6s. 8d. is incompetent, unless for non-payment of sums decerned for in name of aliment. It has been decided that inlying expenses fall within the exception (*g*).

Rules as to *semiplena probatio* superseded by examination of woman as witness.

Such are the rules relative to *semiplena probatio*. The Act allowing parties to a suit to be examined as witnesses, has superseded though not abolished these rules. The Act applies to

(*a*) *M'Naughton* v. *Glass*, 17 Feb. 1838, 16 S. 614 and 1103.

(*b*) *Per* Lord President (Boyle) in *Folley* v. *Douglas*, 28 June 1848, 10 D. 1424.

(*c*) *M'Naughton* v. *Glass*, *supra*; *Greig* v. *Morrice*, 9 June 1838, 16 S. 338; *Folley* v. *Douglas*, 26 June 1850, 12 D. 1090.

(*d*) *Dobbie* v. *Gaff*, 18 July 1843.

(*e*) *Jameson* v. *Barclay*, 14 Jan. 1820, F. C.

(*f*) *Ruddiman* v. *Bruce*, 11 Nov. 1863, 2 Macph. 70. There was a delay of six years.

(*g*) *Cheyne* v. *M'Gungle*, 19 July 1860, 22 D. 1490.

actions of filiation, and in every case the parties are examined as witnesses *in causa;* and the woman having thus appeared as a witness, is not entitled, on the ground of a *semiplena probatio* having been established, to emit her oath in supplement. Now that the pursuer is admitted, as a matter of course, to give evidence in the cause (*a*), her testimony is taken just as that of an ordinary witness, and the Court decides upon the evidence as a whole (*b*). In a case which occurred soon after the passing of the Evidence Act, it was decided that the testimony of the mother of an illegitimate child, given by her in the position of a witness, is liable to be tested by cross-examination; and its credibility is to be weighed by the same rules which apply to the testimony of other witnesses, and the case will be decided upon a view of the whole evidence led by both parties (*c*). The rule as to the proper mode of conducting the cross-examination of the pursuer so adducing herself as a witness, was thus stated in a recent case: 'Although we have had several opportunities of giving expression to our views as to the mode of conducting the cross-examination in cases of this kind, I think it very advisable that the parties principally concerned, the practitioners in the inferior courts, should be made aware of the view which we take. Where in a case of this kind it is intended to contradict the principal witness by other evidence, to be afterwards led, upon matters which, if true, she must be acquainted with, it is only fair and just that that witness should be cross-examined upon the points on which it is proposed so to contradict her. This, as a general rule, is more especially applicable to cases of this kind' (*d*).

Reference to defender's oath.

Where the woman is unable to establish her case upon the proof,

(*a*) 'If the pursuer does not tender herself as a witness, and is not examined on the part of the defender, it may be that in the class of cases where the oath in supplement was competent, the pursuer, having led evidence amounting to *semiplena*, may still ask to be examined. The recent statute contains no enactment on the subject. The old rule may therefore be thought to remain untouched; but it is unnecessary to determine that point in this case.'—*Per* Lord Cowan in *Scott* v. *Chalmers*, 2 Dec. 1856, 19 D. 119. See also *M'Kellar* v. *Scott*, 8 Feb. 1862, 24 D. 499; and *dictum* of Lord President (M'Neill), quoted *supra*, p. 132.

(*b*) *M'Bayne* v. *Davidson*, 10 Feb. 1860, 22 D. 739.

(*c*) *Scott* v. *Chalmers*, *supra*.

(*d*) *Per* Lord Cowan in *Ross* v. *Frazer*, 13 May 1863, 1 Macph. 785.

her last resource is to refer the fact of the carnal connection to the man's oath (*a*). A distinction must, however, be drawn between the effect of the usual judicial declaration made by the man at the beginning of the cause, and this oath of reference. In the former case, it has been already seen how the Court will construe it in particular circumstances; in the latter, the oath must be taken with all its qualifications; so that if sexual intercourse is not admitted at or about the supposed time of conception, the defender must be assoilzied. Accordingly, in a case where, on reference to the man's oath, he admitted sexual intercourse 306 days before the birth, but denied having it subsequently, the Court, conceiving this not to be a possible gestation, and holding themselves bound by the oath, held it negative of the paternity. The oath is a contract, by the very terms of which the parties must abide, whereas the judicial declaration is to be judged of according to its probable bearing and import (*b*). If the man does not appear to depone, he is held as confessed (*c*).

Advocation of process of aliment.

It is incompetent to advocate an action of aliment to the Court of Session from an inferior court, merely because that court has pronounced an interlocutor finding a *semiplena probatio* established, and allowing the oath in supplement. That oath must first be taken in the inferior court, and then the whole case comes up to the Court of Session (*d*).

(*a*) *Glendinning* v. *Flint*, 17 Jan. 1835, 13 S. 270; *Stewart* v. *M'Kean*, 1774, 5 Sup. 554; *Cameron* v. *Armstrong*, 28 June 1851, 13 D. 1256. In this case it was contended that the whole cause must be referred; but the Court limited the reference as stated in the text.

(*b*) *Boyd* v. *Kerr*, 17 June 1843, 5 D. 1213.

(*c*) *Grant* v. *M'Gregor*, 20 June 1839; *M'Kellar* v. *Scott*, 8 Feb. 1862, 24 D. 499.

(*d*) *Fraser* v. *Mellis*, 10 Jan. 1834, 6 Jur. 189; *Murdoch* v. *Munro*, 26 Nov. 1844, 7 D. 155.

GUARDIAN AND WARD.

PART FIRST.

TUTOR AND PUPIL.

THE law of Scotland divides guardianship into two classes, which, though they agree in some particulars, do yet differ very widely in others. These are tutory and curatory.

What is tutory.

Tutory is a species of guardianship, intended for the protection of persons destitute of the powers of reason. The word itself, in its original meaning, is to defend (*tueri*); and in the Roman law it was applied not only to the guardianship of an infant, but to the protection of a house (*a*); the care of goods (*b*); the defence of a city; and to the lawful defence of one's own person (*c*). In its more common acceptation, it was defined to be a power and faculty granted to one individual to defend the person and protect the property of others who, on account of nonage, cannot do so themselves (*d*). The duties of tutory are, however, more especially confined to that period of a child's life when the law recognises in it no power to contract, to alienate, or to perform any act inferring an obligation, and to the execution of which there is requisite an agreeing mind. The tutor is therefore to stand in the pupil's place, and act for him as he himself would do, were he of perfect age. Hence it has been sometimes said, that *Tutor datur personæ; curator rei.* But by this maxim it is not meant that the tutor has power over the pupil's person only, and not over his estate. It merely

(*a*) Dig. xxiv. 3, 7, 16.
(*b*) Dig. xxv. 1, 15.
(*c*) Dig. i. 1, 3.
(*d*) Ersk. i. 7, 1; Bruce's Tutor's Guide, p. 12; Inst. i. 13; Dig. xxvi. 1, Pr.: Vis ac potestas in capite libero ad tuendum eum, qui propter ætatem suam sponte se defendere nequit, jure civili data ac permissa.

signifies that his authority to a deed being interposed, he thereby renders perfect the imperfect person of his ward, whence it may justly be said that he is given *personæ* (*a*).

What is curatory.

Curatory (from *cura*) applies to a different class of persons. A curator is employed to assist in the management of their affairs, *first*, those who are past pupillarity, but have not yet attained majority; and *next*, those who from infirmity of understanding, of whatever age, are incapable of acting like persons of entire capacity. The curator *consents* to a minor's deeds, while a tutor *grants* them (*b*).

Difference between condition of pupil and minor *pubes*.

'There appears to be a substantial difference between the cases of a minor *pubes* and one in pupillarity. The former is a person known in law, and is capable of consenting to or dissenting from deeds. He acts with consent of his curators, if he have any; and if he have none, can act alone. His deeds are obligatory; he can even sell his heritages, all of which are only subject to reduction, if they have been done to his lesion. On the contrary, an infant (*i.e.* a person in pupillarity) has no person in law; he cannot act nor pursue; even an action for his benefit being raised in the tutor's name *quâ* tutor. The pupil cannot consent nor dissent; he does nothing, everything being done in the name of his tutor' (*c*).

Before proceeding to consider the different kinds of guardianship, it will be proper to explain the law as to the rights and disabilities of those who require guardians. The law of pupillarity will be considered here; that relating to puberty is stated afterwards (*d*).

(*a*) Ersk. i. 7, 14. Elaborate dissertations have been written on this maxim. Seger Historia Tutelæ, pp. 101 and 108. Warnkönig Com. vol. iii. p. 149.

(*b*) Warnkönig, vol. iii. pp. 149, 150.

(*c*) *Per* Lords Craigie and Cringletie in *Sinclair* v. *Stark*, 15 Jan. 1828, 6 S. 340.

(*d*) *Infra*, Part II. chap. i.

DIVISION I.

PUPILLARITY AND CONSTITUTION OF TUTORY.

CHAPTER I.

STATUS OF PUPILS.

SECTION I.

DIFFERENT PERIODS OF AGE UNDER MAJORITY.

BY the law of Scotland, there are three portions of time into which a person's life is divided: 1*st*, Pupillarity, extending to the age of fourteen in males, and twelve in females; 2*d*, Puberty or minority, from fourteen or twelve, till the person, whether male or female, attains the age of twenty-one years; and 3*d*, Majority, being the whole of a person's life after twenty-one. The generic term for the period under twenty-one, without distinguishing whether above or below the age of twelve or fourteen, is minority, in contradistinction to majority (*a*).

These divisions of life were borrowed from the Roman law, but modified by our own customs. By the former system, the distinctions in age were more minute than with us; and Erskine states, that the law of Scotland makes some difference in each of the periods recognised by the Roman law, though the periods of pupillarity, puberty, and majority are principally distinguished with us (*b*). A pupil who was near the age of puberty, did not, by the Roman law, labour under the same disabilities as a pupil *proximus pupillaritati*. After he had passed the age of ten and a half, he

(*a*) Ersk. i. 7, 1, and Prin. *ibid.* (*b*) Ersk. i. 7, 1.

was said to be *proximus pubertati*, and his powers were in a great measure commensurate with those of a minor who had attained to puberty. This distinction was formerly recognised in Scotland to its full extent (*a*). A boy of eleven years of age was held a competent witness to a messenger's execution, 'because he was *pubertati proximus*' (*b*). Baron Hume also has applied the distinction to the criminal law (*c*), but in other decisions it does not appear to have been much regarded (*d*).

Dispensations by the Crown.

Upon the authority of the Roman law (*e*), the sovereign was formerly in use to grant dispensations, whereby a person in minority enjoyed most of the privileges and the status of majority. But these dispensations have been long in desuetude, and were even at an early period considered illegal and *ultra vires* of the Crown (*f*).

Majority and minority fixed irrespective of social position.

By the ancient constitutions of Scotland, the age of capacity to discharge the business of life was regulated in some measure by the status of the party, and the property which he possessed, and not entirely by the number of years he might have lived (*g*). But there is no distinction of this nature in existence at the present day. Majority in all cases, whether in males or females, whether in the son of a baron or a burgess, is twenty-one years (*h*); and the law will hold a person a minor, and as much incapacitated as a minor of fifteen, although he should be twenty-one years of age all but a day (*i*).

How the periods of age are computed.

The periods of age are computed *de momento in momentum;* so that if the minor were born at eleven o'clock at night of the 1st January, he would not be a *pubes* or a major till eleven o'clock at night, fourteen or twenty-one years afterwards. The period must be calculated from the very moment of birth, to the same minute

(*a*) Craig ii. 12, 14.

(*b*) *Home* v. *Home*, M. 8906 (1582). And see *Prior of St Andrews* v. *Kinnear*, M. 16225 (1555).

(*c*) Hume, vol. i. pp. 32 *seq.*

(*d*) *Ramsay* v. *Hay*, 16245 (1624); *Drummond* v. *Cunninghamhead*, M. 3465 (1624); *Campbell* v. *Lovat*, M. 9035 (1731); *Anderson* v. *Cation*, 28 Nov. 1828, 7 S. 78, and 15 Nov. 1832, 11 S. 10.

(*e*) Dig. iv. 4, 3; Novell Leonis 28; Code ii. 45, 2.

(*f*) Craig ii. 20, 2; Hope, Major Practics, MSS. Adv. Lib.; Bankt. i. 7, 103; Bruce's Tutor's Guide, p. 32; *Elliot* v. *Elliot*, M. 8916 (1592); *Keir* v. *Luss*, M. 8916 (1593); *Henryson* v. *Henryson*, M. 8913 (1548).

(*g*) Craig ii. 20, 17; Balf. p. 227.

(*h*) *A.* v. *B.*, M. 16221 (1545); Ersk. i. 7, 1; Bankt. i. 2, 11, and i. 7, 61. *Adam* v. *Adam*, 30 March 1861, 23 D. 859.

(*i*) *Campbell* v. *Lovat*, M. 9035 (1731); *Anderson* v. *Cation*, 28 Nov. 1828, and 15 Nov. 1832.

at the end of the pupillarity and minority. The maxim *dies inceptus pro completo habetur* is here therefore unsanctioned. This was following the rule of the Roman law (*a*).

Evidence of age from records.

Evidence of a party's age, in the great majority of instances, formerly depended upon the register of baptisms kept by the session-clerk, in which was engrossed in most cases the day of the child's birth; in all, of its baptism. Where it is regularly and carefully kept, the Court will hold an extract from that register, joined with an *aliqualis probatio*, to be sufficient to establish the age of the party (*b*). Nay, Erskine (*c*) states a case where minority was found proved by an extract from the session books, *per se*, without any collateral evidence to support it. But the session records are not evidence unless correctly kept (*d*); and they unquestionably are not evidence to redargue other sufficient proof of their falsehood (*e*). It was held that two affidavits by brothers of a party (alleging he was minor), certifying to an entry by their mother in a prayer-book, together with a certificate by the clergyman of the parish in the West Indies, that the records of births and baptisms were lost, and affidavits by two persons that he had been baptized at a particular date, were evidence sufficient to establish minority (*f*). On a minor proponing the fact of his minority, in bar of any claim made against him by a third party, it will not be a sufficient answer that it appear that he had asserted himself, *on other occasions*, to be major, and claimed offices and privileges as such, provided that it can be shown that at the time he made the assertion he laboured under a mistake (*g*).

Within the last few years the registration of births has been placed upon a most satisfactory footing in Scotland. Every child that is born must be registered by the district registrar within three months after the birth. Should this fail to be done, registration

(*a*) Dig. iv. 4, 32; Dig. l. 16, 98; Craig ii. 12, 14, *ad finem;* Stair i. 6, 33; Ersk. i. 7, 36; *Drummond* v. *Cunninghamhead*, M. 3465 (1624).

(*b*) *Thomson* v. *Stevenson*, M. 12701 and 8982 (1666); Ersk. i. 7, 36.

(*c*) Ersk. i. 7, 36.

(*d*) Tait on Ev. p. 52; *Wilson* v. *Aitken*, M. 12700 (1626); *Watson* v. *Glass*, 7 March 1837, 15 S. 753.

(*e*) *Stewart* v. *Hume*, 1 Sup. 14 (1624).

(*f*) *Sutherland* v. *Morson*, 19 Jan. 1825, 3 S. 449.

(*g*) *Sutherland* v. *Morson*, *ibid.* It will afterwards be seen, that where a minor fraudulently induces another to contract with him by asserting that he was major, he will be bound to implement such contract. Part iii. sec. i. *infra*.

after the expiry of the three months can only be made after proof of the birth before the sheriff, and a warrant for the registration being granted by him. Provision is made for the careful inspection of the registers by examiners appointed for the purpose; and it is declared that 'every extract of any entry in the register books to be kept under the provisions of this Act, duly authenticated and signed by the Registrar-General, if such extract shall be from the registers kept at the General Registry Office, and by the registrar if from any parochial or district register, shall be admissible as evidence in all parts of her Majesty's dominions, without any other or further proof of such entry' (*a*).

Meaning of the terms, perfect age; complete age; full age; lawful age.

It often happens that a party is authorized by some instrument or Act of Parliament to do something, or is entitled to claim something, when he has arrived at 'perfect age,' or 'complete age,' or 'lawful age.' In construing such terms, reference must always be had to the particular circumstances of each case. In general, however, they mean 'majority.' 'Perfecta ætas,' says Craig, 'tam in mare quam fœmina, est viginti unius annorum' (*b*). The Legislature, in various statutes, has interpreted 'perfect age,' as also 'full age,' to mean majority (*c*). But in one case a legacy payable at 'perfect age' was found payable at puberty (*d*); and a privilege competent under the bankrupt statute to parties not '*under age*,' was found capable of being exercised by any one above pupillarity (*e*). But to show how variable these terms are, the opinion of Stair may be quoted as to the case of *tutors-at-law*. '*Lawful age*,' he says, 'is not to be understood by his majority, but by his being twenty-five years complete' (*f*). The learned author's opinion here is, that in the general case majority is what is understood by *lawful age*, but that this particular case is an exception to the general rule. In a late case, where a father had left his property to trustees for behoof of his family, appointing the trustees to be curators to his sons till twenty-five years of age, and the sons, on attaining twenty-

(*a*) 17 and 18 Vict. c. 80, ss. 26, 27, 30, 31, 37, and 58; 18 Vict. c. 29; 23 and 24 Vict. c. 85, ss. 10 and 11.

(*b*) Craig ii. 20, 17, and see ii. 12, 14; *Colquhoun* v. *Luss*, M. 560.

(*c*) See 1587, c. 22; 1579, c. 81; 1555, c. 35; 1587, c. 113. 2 Rob. i. c. 6; Reg. Maj. ii. 41, ss. 1 and 2, and c. 68, s. 2, with Skene's Notes, St Will. c. 39.

(*d*) *Goldman* v. *Grieve*, M. 8969 (1626).

(*e*) *Miller* v. *Aitken*, 13 June 1840, 2 D. 1112.

(*f*) Stair iv. 3, 9.

one years of age, entered into a submission with the trustees of all claims under the trust-deed, it was held that while the conventional majority was thus fixed at twenty-five, and the sons could not until that time arrived demand their shares of the property, yet as to everything else, and in particular as to their power to refer claims to arbitration, they must be held to attain majority at twenty-one. It appeared that a variety of procedure had taken place in the submission after they attained the age of twenty-five years; and Lord Curriehill and Lord Deas proceeded somewhat upon this latter ground; but the Lord President (M'Neill) and Lord Ivory were of opinion that majority was a status conferred by the law, with which no conventional agreement could interfere. The Lord President observed: 'I do not think that the objection taken here on this ground of minority—of conventional minority—is a solid ground of objection. I do not think it is in the power of any party so to render another minor as to deprive him of the powers which a party has by the status of majority. There may be a restraint in reference to an estate bequeathed to him to a certain extent; but that does not deprive him of the status. Nor is there any reason or principle for it, because the law recognises his capacity. The granter of a right may have a reason for not allowing the party to get into the management of the whole of the estate till the age of twenty-five years, but the law gives the privileges of a major at twenty-one' (*a*).

SECTION II.

POWERS AND CAPACITIES OF PUPILS.

Pupil has no power to act or consent.

A pupil is held in law to have no person. This general rule will not, however, be allowed to be pushed to its utmost limits, so as to produce absurdity, or be creative of injury to the pupil. Nay, one writer seems to introduce qualifications of it which cannot be brought under either of these exceptions. Thus it is said, that 'though the tutor acts for the pupil, it would appear that regularly all proceedings should be in name of the pupil as well as of the tutor; and hence any deed granted by the tutor, in relation to the

(*a*) *Adam* v. *Adam*, 30 March 1861, 23 D. 862.

pupil's affairs, should bear to be in name of the pupil' (*a*). The authorities do not support this doctrine. Erskine thus states the law: 'A pupil has no person, in the legal sense of the word. He is incapable of acting, or even of consenting' (*b*). And the Court laid down the same doctrine in equally brief language: 'A tutor acts for the pupil, who is himself considered *nobody*, whereas a minor acts with the curator' (*c*). *Infans et qui infantiæ proximus est, non multum a furioso distant* (*d*). Lord Stair, in various parts of his Institutions, states the same doctrine (*e*), and the rule is adopted by other writers (*f*).

A distinction must, however, be observed in regard to the consequences resulting from the rule, that a person under fourteen years of age (or twelve, if a female) has no *persona standi* in law. In all those cases where pupils appear as actors in granting deeds, etc., they must do so by their tutor; but where they are merely passive, as when a deed is granted in their favour, it is taken to themselves solely, without mentioning the tutor (*g*). They cannot contract or grant obligations upon which diligence against either their estate or person will pass (*h*). Their deed is absolutely null (*i*). Consequently, when any deed in regard to the pupil's affairs requires to be granted, it must be executed for him by a guardian, who grants it in his own name, in his administratorial capacity, without the pupil either nominally or in fact consenting to the deed (*k*).

(*a*) More's Notes to Stair, p. xxxix. But see Lectures, i. p. 104.

(*b*) Ersk. i. 7, 14.

(*c*) *Dalgleish* v. *Hamilton*, M. 2184 (1752).

(*d*) Inst. iii. 20, 10.

(*e*) Stair i. 6, 4, and i. 6, 35, and i. 6, 44.

(*f*) Bell's Prin. 2067; Bell's Dict. *v.* Minor; Spottiswoode Practicks, p. 211; Balf. p. 120; Baron Hume's Decisions, p. 411; Wal. p. 281; 2 Jurid. Styles, p. 32; 4th ed. i. p. 101.

(*g*) *Kennedy* v. *Innes*, 6 June 1823, 2 S. 375. See also 1 Jurid. Styles, 4th ed. p. 115.

(*h*) Stair i. 6, 4, and i. 6, 44; Ersk. i. 7, 33; Bell's Prin. 2067, and other authorities, *supra;* 2 Jurid. Styles, p. 32, where a bond is granted by the tutor. *Ker* v. *Hamilton*, M. 8968 (1613).

(*i*) *Bruce* v. ———, M. 8979 (1577). See also *Leith* v. *Elphinston*, 24 Dec. 1523; *Gillespie* v. *Marshall*, 15 Aug. 1565, Off. Reg. of St Andrews; Riddell, Peer. and Cons. Law, p. 425; *Johnston* v. *Ferrier* (1770), M. 8931, and *Niven* v. *Cumming* (1688), M. 8936; in all of which the marriage of a pupil was set aside.

(*k*) Anonymous, 2 Sup. 616 (1672); *Kinghorn* v. *Strangfather*, M. 16256 (1631); *Prior of St Andrews* v. *Kinnear*, 16225, middle of the report (1555); Jurid. Styles, vol. i. p. 105, vol. ii. pp. 32, 33, 319, 369, 370, fourth ed. vol. i. p. 100; also *Aiton*

'It is said that the discharge was not signed by the youngest son, who at the date of it was a boy of seven years of age. That is perfectly true. But the tutor of a pupil is by law empowered to grant a discharge for his ward, and therefore the statement amounts to this, that the discharge was rightly granted by the party entitled in law to grant it' (*a*). Should a pupil succeed to any one as executor, confirmation is taken out in his name, and not in that of the tutor (*b*), though the Act of Sederunt 1730, applicable to factors *loco tutoris*, allows the factor to do it in his name. But in all cases the caution will be found for the tutor; and it will be in favour not only of third parties having interest, but of the pupil executor himself (*c*).

Contracts of pupil not null, if beneficial to him.

There is one exception to the rule, that contracts entered into, or deeds granted by pupils, are null, viz. if the contract should be judged beneficial to them; in which case the party contracting with them may be compelled to perform his obligation. This holds (contrary to the equitable principle, that in contracts both are bound or neither) from favour to pupils, as the law has not denied them the power of making their condition better, though they cannot make it worse, and also *in pœnam* of those who would impose upon their weakness (*d*). This rule is derived from the Roman law (*e*).

Acts wrongously done by pupils infer action.

If the pupil has done any deed without the consent of the party affected by it, the latter will have action against the pupil, to restore, in so far as he is made *locupletior* by his own act. Thus, an action of spuilzie will lie against a pupil for property wrongously taken away by him or his guardian (*f*). A pupil may be a witness in a cause (*g*).

v. *Scot* (1711), M. 16331. These cases show that deeds are granted in the tutor's name alone; and the pupil's name does not appear. See *contra*, *Justice* v. *Queensberry*, M. 16269 (1664).

(*a*) *Per* Lord Curriehill in *Stevenson's Trs.* v. *Dumbreck*, 18 Feb. 1857, 19 D. 472.

(*b*) *Reid* v. *Turner*, 23 June 1830, 8 S. 960.

(*c*) Hope, Min. Prac. p. 30, sec. 97; *Fife* v. *Nicholson*, M. 16354 (1750).

(*d*) Ersk. i. 7, 33; Bankt. vol. iii. p. 48, or iv. 45, 15. For the same principle as to married women, see Fraser, Pers. and Dom. Rel. vol. i. pp. 252–3.

(*e*) Inst. i. 21; Dig. xxvi. 8, 9, pr.; Dig. ii. 14, 28; Vinnius, Com. ad Inst. i. 21, 1.

(*f*) *Somerville* v. *Hamilton*, M. 8905 (1541).

(*g*) Tait on Evidence, p. 342; Bell's Notes to Hume, 246–7. Dickson on Evidence, pp. 981 *seq.*

How a pupil sues when he has tutors.

A pupil having no *persona standi*, is not entitled to institute actions by himself (*a*). In particular, when his father is alive, and consequently is his administrator-in-law, or on his death, when the pupil has tutors, he cannot carry on an action in his own name; but if raised in this manner, it is competent for the tutor afterwards to compear as pursuer (*b*). 'A pupil or minor may be either pursuer or defender. If he is a pursuer, and either his guardians do not concur, or he has none at all, then the defender is entitled to object *in limine* to the procedure, till the guardians concur, or a curator *ad litem* is appointed, and which must be done by the judge; and if the fact appears *in judicio*, it is perhaps *pars judicis* to apply the remedy' (*c*). The proper mode of proceeding is for the tutor to raise the action *quâ tutor*, and to conclude for payment to himself as such (*d*). A pupil who pursues by his administrator-in-law, *quâ* executor or next of kin, must produce a confirmation before extract (*e*). It is out of the usual course to libel the action as at the instance of the pupil with *consent* of the tutor, though this has been sustained as effectual, and a conclusion in such a case to pay the pupil has been held good (*f*). 'It is true that a pupil by himself has no *persona standi in judicio;* but as soon as his tutor or administrator concurs in the action, the defect of his nonage is supplied, because there is a pursuer insisting who has a *persona standi.* In practice, this concurrence, even when given subsequently to the raising of the action, operates *retro* and validates the pursuit. Thus, if a pupil has no tutor or administrator, an action nevertheless may be brought in his own name, and after it comes into Court a tutor *ad litem* may be appointed, with whose concurrence the action proceeds; and it is no objection that the summons

(*a*) *Knolls* (1610), M. 8968. In this case, it was also held that a tutor who was five years abroad, prior to intenting the action, could not sue in name of the pupil.

(*b*) *Fleming* v. *Dickson*, M. 16221 (1545); *Keith* v. *Archer*, 24 Nov. 1836, 15 S. 116; *Robertson* v. *Niven*, 17 Feb. 1829, 7 S. 421. See *Lindsay* v. *Watson*, 14 June 1843, 5 D. 1194.

(*c*) *Per* majority of the Court in *Sinclair* v. *Stark*, 15 Jan. 1828, 6 S. 336.

(*d*) *M'Neil* v. *M'Neil*, M. 16384 (1798). Darling's Prac. p. 88. See Lord Corehouse's note in *Keith* v. *Archer*, *supra*.

(*e*) *Reid* v. *Turner*, 23 June 1830, 8 S. 960.

(*f*) *Keith* v. *Archer*, *supra*. In *M'Kenzie* v. *Sinclair*, 26 June 1834, 12 S. 822, the action was raised by tutors in name of the pupil, and the decree obtained was found to be irreducible on that ground.

was raised and executed in the pupil's name alone, and before any tutor *ad litem* was appointed' (*a*). 'I think the interlocutor is right on the merits. It was scarcely possible to frame a summons more cautiously or safely, so far as regards the instance; for it sets forth both the instance of the pupil with concurrence of the administrator, and also the instance of the administrator himself. The objection, therefore, is rested solely on the terms of the conclusion, which is for payment of damages to the pursuer, the said James Keith, who was the pupil. I think the objection is too critical. This must be read as a conclusion for payment to be made to James Keith, with consent and concurrence of his father as his legal guardian' (*b*).

How pupil sues when he has no tutors.

If, on the father's death, the pupil has no tutors, the libel is laid (unlike an extrajudicial act) (*c*) as at his own instance (*d*), and inhibition and arrestment may be used on it in his own name (*e*).

Curator *ad litem* appointed to pupil.

When the action comes into Court, a curator *ad litem* will be appointed to attend to the pupil's interest (*f*). This appointment only takes place when the action is in Court; it would be incompetent to apply for the appointment till the case is pending (*g*). The appointment is only made to a particular case, never to carry on actions in general (*h*). 'I conceive a curator *ad litem* to mean a curator *ad litem pendentem;* and I think it would be dangerous for the Court to give power to raise actions in this way' (*i*). In the case of *Baird*, petitioners, the application was made for power to the factor to pursue and defend in processes, 'which was refused, as the Lords never authorize a tutor (curator?) *ad lites* in general

(*a*) *Per* Lord Corehouse (Ordinary) in *Keith* v. *Archer*, *supra*.

(*b*) *Per* Lord Mackenzie, *ibid.*

(*c*) *Supra*, p. 150 (*k*). See *Bennet* v. *Turnbull* (1628), M. 2181.

(*d*) *Dictum* of Kilkerran in *Johnston* v. *Johnston*, M. 16346 (1740); Lord Balgray in *Keith*, *supra*, and *Darling*, p. 88;—doubted by Lord Ormidale (Ordinary), but confirmed by Inner House, in *Sceales* v. *Sceales*, 13 June 1865.

(*e*) *Johnston* v. *Johnston*, *supra*. Darling, p. 88.

(*f*) *M'Neil* v. *M'Neil*, M. 16384 (1798). Darling, p. 88.

(*g*) *Young*, petrs., 20 Dec. 1828, 7 S. 220; *Pyper*, supplicant, M. 16330 (1711); *Johnston* v. *Johnston*, *supra*. See *Ferguson's Trs.* v. *Hamilton*, 13 July 1861, 23 D. 1290, where a case having gone to the House of Lords, the Court of Session refused to appoint a tutor *ad litem* to attend to the interests of a pupil born after the appeal was entered. But the House of Lords having sisted the case, and remitted it back to the Court of Session for that purpose, the tutor *ad litem* was appointed. *Hamilton*, 14 Nov. 1861, 24 D. 31.

(*h*) *Baird*, petrs., M. 16346 (1741).

(*i*) *Per* Lord Justice-Clerk in *Young*, petrs., *supra*.

without prejudice to the factor's applying from time to time, as any particular process should be pursued for or against the pupil, to the Lords for a tutor (curator?) *ad hanc litem*' (*a*).

The pupil, even although he has tutors, will be entitled to institute an action himself, if his tutor be the defender, or have an adverse interest. A curator *ad litem* would of course be given to the pupil when the case came into Court; but the action would be libelled as at the instance of the pupil, and a conclusion of payment to him would be the competent form (*b*). A curator *ad litem* will also be appointed where the father refuses to concur with the child. Lord Jeffrey observed: 'Though a father is vested with the character of administrator, he is not bound to concur in all the absurd actions of his children. At the same time, is there no remedy for a father's obstinacy? If he will not concur, will the law debar the child from insisting on its just rights? That cannot be, and therefore a curator *ad litem* in such a case is the resource to which we must look for a solution of the difficulty.' And the Lord President observed: 'The instance is perfectly good, if a curator *ad litem*, though a stranger, be appointed' (*c*). The curator *ad litem* has no authority to compromise an action (*d*).

A pupil can do no act while the process is pending to compromise his own interest. He cannot, for example, prorogate jurisdiction without a curator *ad litem* (*e*). After he has obtained his decree as pursuer, it cannot be reduced on the ground that the action was instituted at the pupil's instance alone, without his tutor's being a party to the action; this being a defence that ought to have been stated *debito tempore*, and which the defender is barred *personali exceptione* from proponing after decree (*f*).

How pupil sued when he has tutors.

When the pupil has tutors, he must be cited personally, and

(*a*) *Baird*, petrs., *supra*.

(*b*) Darling, p. 88; Lords Balgray and Mackenzie in *Keith* v. *Archer*, 24 Nov. 1836; *M'Neil* v. *M'Neil*, M. 16384 (1798). On the other hand, a father or other tutor may sue the pupil, and a curator *ad litem* will be appointed. *Paterson* v. *Sandilands* (1617), M. 8968; *Bargeny* v. *his Children* (1623), M. 16242; *Agnew* v. *Stair*, *infra*, and cases *infra*.

(*c*) *M'Connochie* v. *Bennie*, 2 March 1847, 9 D. 792.

(*d*) *Stephenson* v. *Lorimer*, 16 Jan. 1844, 6 D. 377.

(*e*) 1 Bell's Com. p. 132; *Rankine* v. *Rankine*, 31 May 1821, 1 S. 43.

(*f*) *Sinclair* v. *Stark*, 15 Jan. 1828, 6 S. 336; *M'Kenzie* v. *Sinclair*, 26 June 1834, 12 S. 822.

the tutors edictally, at the market cross of the county town of the pupil's residence (*a*); and this is the form, if he be within the kingdom, though his curators be out of it (*b*). Should the citation to the tutors be omitted, this will prove fatal to the action (*c*). In a question with the debtor, it was held that an adjudication led against an heir, which had been followed by charter, was absolutely null, because in the action of constitution by which it was preceded his tutors had not been cited. The Lord Justice-Clerk (Boyle) said: 'The objection here goes to the foundation of the adjudication itself, which cannot stand at all.' And Lord Glenlee observed: 'The question here is, Was there any constitution of the debt before there was any diligence against either moveables or lands? And how can that be where the tutors and curators are not called? She could not upon this decree have arrested; and how can she say that she has got decree of adjudication? It is an absolute nullity' (*d*). A father administrator need not be specially cited. It is sufficient that tutors and curators be cited in general (*e*). Personal service on the pupil, and on the father or whole tutors, is sufficient without edictal citation of tutors and curators, if he any has (*f*). Action may be raised against the tutors as representing the pupil; and if the pupil should during the dependence attain puberty, he may be sisted as defender, and have a curator *ad litem*

(*a*) Ersk. iv. 1, 8; Darling, p. 89; Campbell on Citations, p. 48; *Sinclair* v. *Stark*, *supra*.

(*b*) *Rankilor* v. *Aiton* (1625), M. 3707; *Fairholm* v. *M'Kenzie*, M. 3709 (1710); *Sinclair* v. *Stark*, *supra*. Darling, p. 91; Ersk. iv. 1, 8. *Elphinstone* v. *Bruce* (1610), M. 2178.

(*c*) *Dalgleish* v. *Hamilton* (1752), M. 2184; *Crighton* v. *Rossie* (1573), M. 2178; *M'Dougal* v. *Kennedy* (1628), M. 8999. But see *Fergusson*, 11 June 1853, 2 Stuart 455, where it was held that the omission to cite tutors and curators edictally — an omission afterwards remedied by their citation—was not so radical a defect as to necessitate a reappointment of the curator *ad litem*, who had been named on the case coming into Court before the defect in the service was discovered. See also *Brackenridge* (1809), 1 Bell's Com. 705, n. 3. In the case of a suspension of a charge, it would seem to be unnecessary to cite tutors and curators if the charge be given in name of the pupil alone. *Burgesses of Glasgow* v. *Lorn* (1627), M. 2180.

(*d*) *M'Turk* v. *Marshall*, 7 Feb. 1815, F. C. In some previous cases, as in *Buchanan* v. *Gray* (1801), M. App. Adjud. 12, the Court restricted an adjudication which was not preceded by constitution to a security.

(*e*) *Kinghorn* v. *Collace*, M. 2180 (1626); *Buchanan* v. *Gray*, M. App. Adjud. 12 (1801).

(*f*) *Cairnoussie* v. *Techmurie* (1629), M. 2181; *Lie* v. *Porteous* (1630), M. 2182; *Erskine*, 6 Feb. 1852, 14 D. 766, 1 Stu. 376.

How pupil sued when he has no tutors.

appointed (*a*). Where the pupil has no tutors, he is himself cited personally, and even then his tutors edictally. Erskine (*b*) seems to think, that when there are no tutors, there is no need for this edictal citation; but it has been decided otherwise (*c*), and the modern practice is in accordance with the decision (*d*). The usual *induciæ* apply in such cases. In a case of an entail petition, where two of the next heirs whose consents were required were minor and abroad, the Court would not shorten the *induciæ* of sixty days, though their father, whose consent was also required, consented to the shortening of the *induciæ* (*e*).

Curator *ad litem* when pupil is defender.

A curator *ad litem* is appointed by the Court to a pupil defender, should he enter appearance (*f*). It was for some time the rule for the Court to appoint a curator *ad litem* in all cases, whether appearance had been entered for the pupil or not (*g*); but this has been overruled, and the practice now is (*h*), not to make

(*a*) *Mackenzie* v. *Mackenzie's Tutors*, 1 July 1846, 8 D. 964.

(*b*) Ersk. iv. 1, 8.

(*c*) *Crighton* v. *Rossie*, *supra*; *Calderhead's Trs.* v. *Fyfe*, 26 May 1832, 10 S. 582.

(*d*) Darling, p. 90. But see *infra*, Part. i. Div. ii. chap. ii. sec. 14.

(*e*) *M'Laine*, 6 June 1850, 13 D. 40.

(*f*) *Youngs*, petrs., 20 Dec. 1828, 7 S. 220; *Johnston* v. *Johnston*, M. 16346 (1740); *Agnew* v. *Stair*, 31 July 1822, 1 Sh. App. 333; Darling, p. 90; *Pyper* (1711), M. 16330. The conduct of the cause is entrusted to the curator *ad litem*. If he thinks it unnecessary or improper to make appearance for the pupil, he may refrain from doing so, and he will not thereby be precluded from making a professional charge for examining the process. *Pridie* v. *Collie*, 5 March 1851, 13 D. 841.

In entail petitions, where, under the provisions of the Entail Amendment Acts or special Acts of Parliament, tutors are authorized to give their consent (11 and 12 Vict. c. 36, sec. 31), a separate *tutor* (as the statute calls him) *ad litem* must be appointed for each pupil: *Hamilton*, 3 Feb. 1853, 15 D. 371, 2 Stu. 194; *Gibb*, 29 May 1857, 19 D. 768; *Dalrymple*, 10 July 1857, 19 D. 964. 'Tutors' *ad litem* are only appointed after intimation and service: *Inglis*, 28 June 1855, 17 D. 1005; and while the 'tutor' *ad litem* ought to be immediately thereafter appointed, it is not a good objection to the procedure that this has for a time been omitted, provided that the 'tutor' *ad litem*, when he is appointed, expresses his approval of what has been done: *Kerr* v. *M. Ailsa*, 18 Dec. 1851, 14 D. 240, 1 Stu. 193; House of Lords, 12 June 1854, 1 Macq. 736. It was decided that if *pendente processu*, before the petition has been carried through, a child be born nearer to the succession than an heir whose consent has been obtained, a 'tutor' *ad litem* must be appointed to guard the infant's interest. *Burton*, 11 March 1851, 13 D. 955. See 16 and 17 Vict. c. 94, s. 19.

(*g*) *Bannatyne* v. *Jack*, 14 Dec. 1814, F. C.

(*h*) *Sinclair* v. *Stark*, 15 Jan. 1828, 6 S. 336; *Calderhead* v. *Fyfe*, 26

such appointment until the pupil shall have appeared; and the decree is held to be in all respects like an ordinary decree in absence, though formerly it was regarded as altogether null (*a*). 'Where a pupil is defender, and where our law has pointed out specifically how he is to be called into Court, it may be doubted how far a pursuer can compel the appearance of such a defender and his tutors and curators. Suppose a pupil has tutors, and that they are even *nominatim* and personally called, can a pursuer compel their appearance; or can he take upon himself to name other tutors to validate his proceedings, which the real tutors disavow, and do not acknowledge? Where, again, the pupil has no tutors or guardians at all, there is no form, by the law of Scotland, by which such nomination can take place. In that way every person who has a claim against a pupil would have the power of nominating a curator *ad hunc effectum*. The judge has no power to exercise any such jurisdiction, where the party does not appear before him. By the law of Scotland, a pursuer cannot compel a party to appear *in judicio*. In all such cases the pursuer has no remedy but to take a decree *valeat quantum*. When the matter is properly considered, it is apprehended that the interest of pupils is far better protected in the one way than in the other. If the pursuer is entitled in every case to name a curator *ad litem* to a pupil defender, he in the first place infringes the law of Scotland by compelling a party to appear *nolens volens;* and next, he necessarily obtains the nomination of a person who can have little knowledge of the pupil's affairs, and fixes down a *res judicata* upon an imperfect discussion. There is far more danger to the interests of a pupil in this way than in any other; for the appointment of a curator *ad litem* can be with no other view than to validate the

May 1832, 10 S. 582. In a case as to the custody of a pupil, it was held to be unnecessary to appoint a curator *ad litem* to the pupil, when the tutor-at-law appeared, though the tutor-at-law was going to England: *Stuart*, 23 Nov. 1860, and 19 Feb. 1861, 23 D. 51 and 595.

(*a*) *Baillie* v. *Silvertonhill* (1621), M. 6616; *Henderson* v. *Knockhill* (1628), M. 8969; *M'Dougall* v. *Kennedy* (1628), M. 8999; *Campbell* v. *Graham's Reps.* (1750), M. 9021; *Sinclair* v. *Stark*, 15 Jan. 1828, 6 S. 336; *Dick* v. *M'Ilwham*, 15 May 1828, 6 S. 798, 5 May 1829, 7 S. 364; *Sinclair* v. *Campbell's Trs.*, 3 March 1835, 13 S. 594, H. L. 17 July 1835, 2 S. and M'L. 103; remitted to C. of S. and heard 9 March 1837, 15 S. 770, and finally decided 10 March 1841, 3 D. 871; *Arnott* v. *Purdie*, 3 June 1830, 2 Jur. 430. But see *Thomson* v. *Scott*, 21 Dec. 1842, Jur.

proceedings. If it has no such effect, it is worse than useless. It must be far more beneficial to pupils to allow them the ordinary remedies of law, which amply protect them' (*a*). In an action against two pupils, where one of them appeared and the other did not, the Lord Ordinary appointed a curator *ad litem* to the one who appeared; 'but in respect that the other pupil who is called as defender has not appeared in Court, finds it incompetent, at the instance of the pursuer, to appoint a curator *ad litem* to her' (*b*).

It has been found, that although the pursuer of a reduction of a decree in absence is, in respect of minority, entitled to reduce it, he will not forthwith be reponed, but only heard on the merits of the decree (*c*). If the pupil *come into Court*, either as pursuer or defender, then the opposite party is entitled to ask that he shall come with a legal guardian, in order that decree may be effectual against him (*d*). If, after appearance is entered for him, no curator *ad litem* is appointed to conduct his case, the decree which may be pronounced against him would still be a decree in absence, though the case may have been debated (*e*). And where the proceedings are such as to require his appearing as a defender, the failure to appoint a curator *ad litem* will vitiate the whole proceedings, even although the challenge be not made till after a lapse of years. Such was the question in the case of *Agnew* v. *Earl of Stair* (*f*). Authority had been obtained by private bill to bring to sale part of the entailed estates of Bambarroch and Sheuchan, and under this act an action of declarator and sale was brought, which was duly served on the next heirs of entail, some of whom were the minor and pupil children of the pursuer, their tutors and curators, if they any had, being edictally cited. In some previous proceedings Lord Braxfield had been appointed curator *ad litem* to the pupil children, but no such appointment was made in the action of declarator and sale. Decree was however pronounced, and several

(*a*) *Per* Lord Balgray in *Sinclair* v. *Stark*, 15 Jan. 1828, 6 S. 336, concurred in by Lord President (Hope), and Lords Gillies, Meadowbank, Mackenzie, Medwyn, Corehouse, and Newton.

(*b*) *Calderhead* v. *Fyfe*, *supra*, p. 156.

(*c*) *Macdonald* v. *Brown*, 12 Dec. 1838, 14 F. 206; *Dick* v. *M'Ilwham*, *supra*, p. 157.

(*d*) *Calderhead* v. *Calderhead*, 26 May 1832, 10 S. 582.

(*e*) *Sinclair* v. *Stark*, *supra*; *Agnew* v. *Stair*, 31 July 1822, 1 Sh. App. 333.

(*f*) 1 Shaw App. pp. 357 and 361.

parcels of land sold. At the distance of twenty years the transaction was challenged by one of the pupils, and the whole proceedings set aside by the House of Lords reversing the judgment of the Court of Session. The Lord Chancellor observed: 'The Court of Session should have called all the heirs; and in case of these being infants, they should have brought before the Court the persons representing them, and in the presence of all have ascertained the whole extent and amount of the debts,—themselves judging which were to be considered as affecting the estates, before they proceeded to any sale of the property. Now, I cannot believe that the infant children of Robert Vans Agnew were at all represented in the Court below. I think it is clear they were not. It is very true, Lord Braxfield had been appointed tutor *ad litem* in the suit in 1784; but there is no evidence that they were brought before the Court at all in this suit. The whole proceedings, therefore, appear to me contrary to the powers and authorities given to the Court of Session in order to make good titles to the purchasers.' And to the same effect Lord Redesdale observed: 'The Court of Session proceeded without any authority whatsoever. I conceive that, in decreeing those sales, they had no more authority than I have for the purpose; for the Act of Parliament required that a suit should be instituted, to which all the heirs of entail were to be called, and to be made defenders to that suit. In the proceedings instituted for the purpose, the minor heirs of entail, the children of Mr Robert Vans Agnew, were named in the proceedings, but they were not called before the Court: the proceedings were against them wholly in absence; and according to all the authorities in the law of Scotland, a proceeding against minors in absence *is wholly void* (*a*); and therefore I apprehend that the whole of the proceedings of the Court of Session in Scotland, with respect to the sale of this estate, were null and void.'

Defence by pupil having tutors, without their concurrence.

Of course, if the pupil has tutors, and they do not appear with him in the suit to defend him, the decree against the pupil will be reducible, even though a defence were maintained for the pupil; and it matters not that the tutors were parties to the cause, if they were not so in *that* character. 'The point to which the case is brought at last is, then, very simple, and in my opinion very clear.

(*a*) This cannot be held as law after the case of *Sinclair*, *supra*, p. 157.

A pupil cannot appear himself as defender. His name can only be used by those who have by the law authority to do so. To allow any one else to enter appearance for him as defender, is extravagant. Parties in this case had been, I assume validly, named by the father to the legal office of tutors, and were actually at all events in the possession and exercise, by the forms of law, of that office. They could appear in their own name and for their pupil. That would have been legal appearance for him, and made him a party to the action. By himself (having no *persona standi*) he could not be made to appear. An entry or use of the name of a pupil as defender in the record is invalid and incompetent; and without the appearance of his proper representatives, for such tutors are, there is no appearance for them. The remarks of Lord Eldon and Lord Redesdale, in the case of *Vans Agnew* (July 1822, 1 Sh. p. 320), and the words of the judgment against the purchasers, apply here in terms; for the necessity and mode of representing a pupil at common law is as clearly prescribed as could be required under a private Act of Parliament which had no special provision on the point. Then the pupil was no party to the process, and the whole proceedings against him *nominatim* must necessarily be set aside.' 'There is no doubt of the three following points:—1. That a pursuer cannot compel tutors and curators to make appearance for their pupil; 2. That the pupil cannot make appearance, and that his name by itself therefore cannot be used, and the entry of such name by others is no appearance for him at all in point of law; and 3. That the pursuer, in such a case as the original action, had no right to make appearance for the pupil by getting a tutor *ad litem* appointed to him' (*a*).

Appearance by pupil and one of a number of tutors.

Where, however, the tutors have been regularly cited, and appearance made for the pupils and one of two tutors, a decree against them cannot be treated as a decree in absence against the other tutor who did not appear (*b*).

(*a*) Lord Justice-Clerk (Hope) in *Craven* v. *Elibank's Trs.*, 9 March 1854, 16 D. 818. See effect given to these views in the recent case, *Thomson's Trs.* v. *Livingstone*, 11 June 1864, 2 Macph. 114, where the tutors and curators of the pupil, if he any had, not having been called, the action was held to be incompetent, though appearance was made for the pupil and a curator *ad litem* appointed.

(*b*) *Wallace* v. *Anderson*, 21 Dec. 1826, 5 S. 179.

Form of summons against pupil and tutors.

The conclusions of a summons ought to be directed not only against the pupil, but also against his tutors *nominatim*, where such are known, or against tutors and curators generally, if he any has, where he has no known tutors. To this there are some exceptions (*a*).

Intimations, havers, arrestments, prescription, imprisonment, charge, etc.

The tutor, and not the pupil, is the party who should be examined as a haver. 'It was thought that a pupil could not be convened as a haver, seeing he had not himself, so to say, not being *sui potens;* and it was holden *pro confesso* that a pupil could not *inchoare possessionem rei alienæ.*' 'The most part thought a pupil could not *teneri de facto non magis alieno quam proprio,* unless he were heir to his father; or if he have tutors, they may be convened *nomine tutorio* as havers, and not the pupil' (*b*).

(*a*) This matter was one of the points considered in *Craven* v. *Elibank's Trs.*, and a remit was made by the Court to Professor Menzies, to inquire into the practice as regarded this point. He reported that he had examined 102 decrees, dated between the years 1813 and 1817, and that the result was as follows:—Six of the decrees were in suspensions, which did not afford information; but of the remaining ninety-six, sixty contained conclusions directed not only against the pupil, but against his tutors and curators, if he any had, and in a few instances against tutors *nominatim;* fourteen were summonses of reduction, in which, in accordance with the usual practice and style in such cases, the will beginning immediately after the address, the tutors and curators, as well as other defenders, were necessarily inserted in the will; thirteen were summonses of adjudication, declarator, constitution, multiplepoinding, and furthcoming, in which the tutors and curators were only called in the will along with the pupil, but they were mentioned in the body of the summons *narrative,* and in a few instances in the conclusions, as having been charged or as having been decerned against in a previous action of constitution or otherwise; and nine were actions of multiplepoinding, declarator of non-entry, declarator and adjudication, declarator as to a succession, maills and duties, repetition and relief, constitution, or transference, in which tutors and curators were cited only in the will, and they were not elsewhere mentioned (*Craven* v. *Elibank's Trs.*, *supra*). The Court, after special findings that the summons had been executed against the pupil and his tutors and curators, if he any had, and against the tutors of the pupil in their character of trustees; that the summons was called against the pupil *nominatim* and separately, and against the trustees separately; that appearance was entered, and the defences given in for the pupil separately, and the trustees separately; and that throughout the whole of the proceedings the name of the pupil was then used, and no appearance was ever made for the tutors and curators,—found 'that the said pupil was not competently and habilely made a party to the said action, and that his rights and interests were not represented and protected in said action,' and therefore reduced the decree complained of.

(*b*) *Ratio* in *Aitken* v. *Hewat*, *infra*.

If there be no tutor, application must be made to the Court for the appointment of a curator *ad litem* (*a*). When an intimation of any right or title, such as an assignation, is to be made, it should be so to the tutor alone (*b*), although the contrary rule has been in a special case recognised (*c*). An arrestment should be left in the hands of the guardian, and not of the pupil (*d*). Where anything has been furnished to a pupil, and he is pursued therefor, or for a debt of his father's, upon which the triennial prescription has run, he being in pupillarity at his father's death, a reference after pupillarity of *resting owing* to his oath is incompetent (*e*). A pupil, being creditor in an adjudication, is not bound to depone on the verity of the debt (*f*). By the common law a pupil cannot be imprisoned on a civil debt (*g*); and this has been expressly enacted by statute 1696, c. 41. It is the tutor who is charged upon a horning (*h*); but the pupil's property may be attached for his debt (*i*).

How far the law takes regard of a child unborn.

In many respects a child *en ventre sa mere* is held to be an existing being, capable of holding rights; and so far as these are in his favour, he is regarded as already born (*k*). A legacy may be bequeathed to him; a tutor appointed to him (*l*); a provision or legacy in favour of '*children*' will include him (*m*); and if posthumously born, his legal rights as a child will not be thereby prejudiced (*n*). A legacy to children who shall be '*living*' at the

(*a*) Spottiswoode Practicks, p. 211; *Aitken* v. *Hewat*, M. 8907 (1628); *Craven* v. *Elibank's Trs.*, 9 March 1854, 16 D. 817–8.

(*b*) *Queen's Advocate* v. *Coldenknowes*, M. 16230 (1566).

(*c*) *Robertson* v. *Niven*, 17 Feb. 1829, 7 S. 421.

(*d*) Brodie's Stair, note, p. 430; More's Stair, notes, p. cclxxxviii.

(*e*) *Somervell* v. *his Debtors*, 2 Sup. 497 (1670); *Little* v. *Graham*, 4 Feb. 1826, 4 S. 424.

(*f*) *Gordon's Tutors* (1707), M. 8909.

(*g*) See the reasoning and *dicta* in *Mackenzie* v. *Scott*, 4 Sup. 282 (1695). See also *Murray* v. ——, M. 8909 (1677); *Johnston* v. ——, M. 8906 (1577); *Somervell* v. *her Father's Creditors*, M. 8906 (1625); *Erskine* v. *Edmonstone*, M. 8908–9 (1633); *Anonymous* in Brown's Synopsis, p. 1363 (1612), *contra* to *Somerville* v. *Hamilton*, M. 8905 (1541), and the opinion of Kilkerran in *Thomson* v. *Kerr*, M. 8910 (1747).

(*h*) *Raa* v. *Yester*, M. 16237 (1595).

(*i*) *Drummond* v. *Menzies*, M. 16320 (1704).

(*k*) Dig. i. 5, 7 and 26; Bankt. i. 2, 7.

(*l*) *Murray* v. *Marshall*, M. 16226 (1555); Bankt. i. 2, 7.

(*m*) *Oliphant* v. *Oliphants*, Bell's Cases, p. 125, and Sup. vol. v. p. 648 (1794); *Hardman* v. *Guthrie*, 6 June 1828, 6 S. 920.

(*n*) Bell's Dict. *v.* Posthumous Child; Bankt. i. 2, 8.

time of the testator's death will include him (*a*). In a late English case, where there was a legacy in trust for all the children of the testatrix's nephew *born in her lifetime*, it was held that a child born a few months after the death of the testatrix came within the description (*b*). The whole rules arising out of the maxim *si sine liberis decesserit* show the regard which the law has to children unborn.

(*a*) See the English case of *Clark* v. *Blake*, 2 Br. Ch. Rep. 320, S. C. by the name of *Doe* v. *Clarke*, 2 H. Black 399, and 2 Ves. jun. 672, S. C., referred to in *Thelusson* v. *Woodford*, 4 Ves. 342; *Northy* v. *Strange*, 1 P. Wms. 342, and Gibb Eq. Rep. 136.

(*b*) *Trower* v. *Butts*, 1823, 1 Sim. and St. 181.

CHAPTER II.

DIFFERENT KINDS OF GUARDIANSHIP OF PUPILS.

THERE are, in the law of Scotland, different kinds of guardianship of persons in pupillarity: 1. The father as administrator-in-law; 2. Tutors-testamentar; 3. Tutors-at-law; 4. Tutors-dative; and 5. Factors or curators appointed by the Court of Session.

SECTION I.

FATHER AS ADMINISTRATOR-IN-LAW.

Under the name of administrator-in-law, a father is tutor and curator to his children (*a*). It is here proposed to treat of his duties as administrator during the child's pupillarity. The law regards the father as the most preferable of all guardians, and during his life no other (if he be capable of discharging the duties of his office (*b*)) can claim the administration (*c*). A father requires no judicial proceeding in order to invest him with the office (*d*). He is not obliged to make up tutorial inventories (*e*); nor to make oath *de fideli administratione officii* (*f*); nor is he liable for omissions,

(*a*) Craig ii. 20, 7; Stair i. 5, 12; M'Ken. i. 7, 17; Bankt. i. 6, 2; Ersk. i. 6, 54.

(*b*) When the father is bankrupt and in prison, or fugitated, another guardian will be appointed: *Barclay* (1698), 4 Sup. 405; *Forbes* (1673), M. 16287.

(*c*) Authorities in (*a*), and More's note to Stair i. 5, 12; *Fleming* v. *Dickson* (1545), M. 16221; *Bartholomew* v. *Bartholomew* (1681), 2 Sup. 280.

(*d*) Stair i. 5, 12; Bankt. i. 6, 2; Ersk. i. 6, 55; Wall. p. 281; Bell's Prin. s. 2068; *N.* v. *Parbroth*, M. 16224 (1554).

(*e*) Vinnius Select. Quæst. lib. ii. c. 16; Bankt. i. 6, 2; Wall. p. 282; Ersk. i. 6, 55.

(*f*) Stair i. 5, 12; Bankt. i. 6, 2 and 4; Wall. p. 282; Ersk. i. 6, 55.

nor for neglect of management, but only for his actual intromissions (*a*). Nor is he in general bound to find security or caution for the due discharge of the duties of his office (*b*); and finally, he is entitled to the custody of his child, although he be his nearest and lawful heir (*c*). Although a tutor must have attained the age of majority before he is eligible to the office, yet a father, though himself in minority, may be administrator-in-law to his children (*d*).

To what children is the father administrator.

This right of administration is over immediate children only; so that neither the paternal nor maternal grandfathers have any title to the office (*e*). Nor has the mother any right of guardianship (*f*). It moreover extends only to children lawfully begotten. A bastard being in law *nullius filius*, his real father is not his administrator-in-law (*g*). On the other hand, a bastard father having children lawfully begotten is their administrator (*h*).

Father's powers as administrator-in-law.

It will be unnecessary here to detail the various powers which the father, as administrator-in-law, possesses, because they differ in nothing from the rights and powers so fully detailed afterwards, as belonging to ordinary tutors. Those rights which more particularly depend on fathership, relative to the education and custody of the child, have been already considered under that part of this work applicable to parent and child (*i*). The father's right of administration extends over all the property belonging to his children, whether it came from himself or was given to the child by another; with this exception, that if property be gifted by any one to the child, and tutors be appointed by the donor to manage it, these nominees will alone be entitled so to do (*k*). And if, without naming tutors, the donor should merely exclude the father's right

(*a*) Stair i. 5, 12; Bayne's Notes, p. 35; Wall. p. 282; Ersk. i. 6, 55. See this subject afterwards more fully explained, *infra*, Part i. Div. ii. chap. iv.

(*b*) Bankt. i. 6, 2; Wall. p. 282; Ersk. i. 6, 55.

(*c*) *Supra*, pp. 67 *seq.*

(*d*) Bruce's Tutor's Guide, p. 43.

(*e*) Stair i. 6, 6; Bankt. i. 6, 9; 2 Hutch. Justice, p. 256; *Ld. Lamington* v. *Jolly*, M. 16306 (1685); Bell's Prin. s. 2069; Ersk. i. 6, 55; Correct Craig ii. 20, 7.

(*f*) Wall. p. 283; Stair i. 6, 6; Ersk. i. 7, 2.

(*g*) Ersk. i. 6, 55; *Wilson* v. *Campbell*, 10 March 1819, F. C. *Supra*, p. 122.

(*h*) Balf. p. 117; *Muir* v. *Kincaid*, M. 16250 and 1349 (1628).

(*i*) *Supra*, pp. 65 *seq.*

(*k*) Ersk. i. 6, 54, and i. 7, 2; Bell's Dict. *v.* Father, and *v.* Curator; Stair i. 5, 12, and i. 6, 6. See *supra*, p. 80, and *infra*, p. 174.

of administration, the Court of Session will of necessity be obliged to interfere, by naming a factor *loco tutoris*, other than the father, to manage the property (*a*). But even then the father may interfere, if for the evident benefit of the child (*b*).

Payments to father as administrator are valid.

In ordinary circumstances, a father is entitled, as administrator-in-law, to uplift and discharge any debt or claim due to his child during pupillarity (*c*). 'The nature of the objections set forth in the record, is that the funds were not paid or applied to or on behalf of the objectors; that is, that their father did not so apply them. Of course these sums were not so applied by the trustees, because they were out of their hands, being paid to the person legally authorized to receive payment of them. They were misapplied by the children's father; but that is a matter with which, in the ordinary case, trustees have nothing to do. They were not guardians of these children. They paid the money to the right party; and having done so, they had nothing more to do with the application of it.' 'The objectors complain that payment was made to their father. Why not? He was their legal guardian. But if the money was properly paid to him, their administrator, who was in law entitled to receive it, and was misappropriated by him, that is a matter for which the objectors must call their father to account; but it is a matter with which the trustees, who made the payment properly, have no concern.' 'The father, as tutor of his pupil son, had a legal title to uplift the money. His title of tutor was a good legal title for that purpose, and therefore what is the objection?' (*d*).

Father must find caution in certain cases.

The father, however, cannot assign a claim or debt due to his child (*e*), and the Court of Session exercises a sound discretion for the protection of children; so that if the father be in very poor circumstances (*f*), especially if not resident in Scotland (*g*), or if

(*a*) Ersk. i. 6, 54.

(*b*) *Fidlar* (1745), M. 16350.

(*c*) *Boswell* (1747), M. 16353; *Graham* v. *Duff* (1794), M. 16383. The Court held that the *ordinary* rule did not apply. *Stevenson's Trs.* v. *Dumbreck*, 18 Feb. 1857, 19 D. 462; H. L. 19 Feb. 1861, 4 Macq. 86.

(*d*) *Per* Lord Curriehill in *Stevenson's Trs.* v. *Dumbreck*, *ibid.*

(*e*) *Crawford* v. *Cordiners of Canongate* (1674), M. 16315.

(*f*) *Govan* v. *Richardson*, M. 16263 (1633). Stair i. 5, 12; Bankt. i. 6, 2; Bell's Prin. 2068; Ersk. i. 6, 55; *Ratio* in *Boswell* v. ——, M. 16353 (1747).

(*g*) *Graham* v. *Duff*, M. 16383 (1794).

he be insolvent, the Court will not allow him to exercise his powers as administrator-in-law until he shall have found caution.

Where father is insolvent.

In peculiar cases, such as when the father has been sequestrated and remains undischarged, the Court of Session will supersede him in his office, and appoint a factor *loco tutoris* in his room (*a*).

Payments to father known to be so.

Should a debtor of a pupil make payment to the father as administrator, the latter being at the time insolvent, the debtor, knowing it, pays at his own risk; and he ought, as a matter of safety, to insist upon the father finding security that he will not misapply the money so paid (*b*). But, on the other hand, if he pays in *bona fide*, not knowing of the insolvency of the father, the payment will be sustained; and if, aware of the father's embarrassed circumstances, he insists upon caution being found, it is not required that the caution be judicial: it is enough that at the time the cautioners were reputed solvent and sufficient. This was determined in a case where, the father being in embarrassed circumstances, the trustees who paid over the money to him for behoof of his children insisted on his finding caution, which he did. The father misapplied the money, and the cautioner became insolvent, and an action was brought against the trustees. It was maintained that they ought to have paid only under the authority of the Court, and upon caution to the satisfaction of the Court being found. The Lord Ordinary gave effect to this plea, but the Court of Session altered his interlocutor, and on appeal the judgment was affirmed (*c*). Lord Curriehill

(*a*) *Barclay*, 1698, 4 Sup. 405, where the father, 'not to divest him of his parental right without a trial,' was ordained to be heard before the Ordinary on the Bills. *Johnston* v. *Wilson*, 11 July 1822, 1 S. 558. But see *Saunders*, 10 July 1821, 1 S. 115, where the Court refused to appoint a factor *loco tutoris* to children of a bankrupt under sequestration, but appointed a curator *ad litem* in the sequestration process.

(*b*) *Wilkie* v. *Dalziel*, M. 16311 (1688): *Graham* v. *Duff*, *supra*. See the Lord Ordinary's note in *Stevenson's Trs.*, *supra*. The law of the Lord Ordinary was not disputed, though the Court arrived at a different result. In *Stevenson's Trs.* v. *Dumbreck*, *supra*, the Lord Chancellor (Campbell) observed: 'I am clearly of opinion that poverty of itself would not be a sufficient ground for refusing payment to the father. Men in Scotland and in England, although they are poor, are honest; and it is unreasonable to say that a cottager whose son has had a small legacy left to him, is not to be entitled, because he is poor, to receive the money which may enable him to send the boy to school, and give him a chance of making his way in the world, but that he must waste his money in applying to the Court of Session for security that it shall be duly administered.'

(*c*) *Stevenson's Trs.* v *Dumbreck*, *supra*.

observed: 'The trustees knew that the affairs of this administrator-in-law were in some embarrassment. They did not know that he was bankrupt or sequestrated, or even that he was insolvent, but only embarrassed. They imposed on him the duty of finding caution.' 'He found caution; and it is not alleged that at the time this payment was made the cautioners were insufficient. It is only said that the caution was not approved of by a court of law. I know of no authority in the law of Scotland which requires that such caution shall be judicial. It would have been wise, perhaps, for their own sake, had the trustees obtained the sanction of the Court to their proceedings, so as to exclude all future challenge. But that would have exposed the estate to the expense of such judicial proceedings, and I see no corresponding benefit that would then have been conferred upon it. But the trustees did not apply for such judicial sanction to their proceedings. They took upon themselves the responsibility of the cautioners being sufficient; and it appears from the documents in process, that they did not do so rashly. It was only after inquiry as to their sufficiency that they accepted them, and their sufficiency at the time is not now disputed.' In the House of Lords the Lord Chancellor, Lord Campbell, observed: 'Looking at the admission that there was something more than pure poverty, that there was embarrassment of circumstances, that might have rendered something more necessary to be done than barely paying over the money to the father, and allowing him to dispose of it as he pleased. I think, upon the authority of *Govan* v. *Richardson*, and the other cases referred to, that there would have been strong ground for contending that it would have been unjustifiable in this case for the trustees, under the circumstances which they acknowledge to have existed, simply to pay the money over to the father. But instead of that, they do what, if there had been an application to the Court, the Court would have directed. They obtain caution from two cautioners, who were substantial at the time, and their solvency was inquired into and established to be perfectly sufficient for this purpose.' 'I think that after the caution had actually been given, the trustees had a right to make the payment as they did.'

Whether father can resign the office of administrator-in-law.

In treating, at a subsequent part of this work, of a father's powers when his child has attained puberty, we will have an opportunity of considering the question, whether a father can resign his office

of administrator-in-law, and so open the way to the appointment of a tutor-at-law or factor *loco tutoris*.

SECTION II.

WHO MAY BE TUTORS FAILING THE FATHER.

On the father's death, his removal, his insanity, or resignation of the office of administrator-in-law, there is room made for the appointment of other guardians. It will now be considered who are eligible to the office. The general rule of law is, that every person *sui juris*, and of sane mind, is eligible (*a*). But this rule must be taken under the following explanations and exceptions.

Age of the tutor.

1. By the Roman law, no one could hold this office of tutor until he had arrived at the full age of twenty-five, being the period of majority by that system (*b*). The law of this country has so far adopted this rule, that it requires a tutor-at-law to be twenty-five years of age before he can be appointed (*c*). But with regard to tutors-testamentar, tutors-dative, and factors *loco tutoris*, there is no restriction or qualification of this sort. After they have arrived at the age of majority according to the law of Scotland, namely twenty-one, they are eligible to these offices (*d*). Our earlier writers applied the rule of the Roman law to all tutors (*e*); but the later authorities have disregarded this, and have held that the case of tutors-at-law is special, on account of the express enactment of the statute 1474, c. 51. Nay, a tutor-testamentar may be named to the office, although at the time of nomination he may be a minor. If at the father's death he is still in minority, his right to the office is suspended until he arrive at majority; and in the interim the tutor-at-law will serve and act. Failing him, the Court of Exchequer (now the Court of Session) will appoint a tutor-

(*a*) Bankt. i. 7, 18; Ersk. i. 7, 12.

(*b*) Inst. i. 25, 13; Code v. 30, 5; History of the Roman Law by Hugo, vol. i. p. 184; Mackenzie, Rom. Law 136.

(*c*) Stat. 1474, c. 51; Stair i. 6, 8; Bankt. i. 7, 8; Ersk. i. 7, 5.

(*d*) Bankt. i. 7, 18; Ersk. i. 7, 5; Bell's Prin. sec. 2073; More's Notes, p. xxxv.

(*e*) Balf. p. 117; Bruce's Tutor's Guide, p. 16.

dative; or a factor *loco tutoris* will be appointed by the Court of Session. If the tutor-nominate, on his arrival at majority, declare his acceptance, these interim appointments *eo ipso* fall (*a*).

Disqualification on account of religious opinions.

2. On account of the close intercourse that must subsist between a guardian and ward, the law is careful to guard against the pollution which the latter may receive from the immoral or irreligious training of the former. Our former law created a number of disabilities on this head, which have in later times been disregarded. In particular, there are several statutes prohibiting Roman Catholic parents from educating or having the custody of their children, and debarring persons of that religious persuasion from being appointed tutors or curators (*b*). These statutes appear to be repealed by the Roman Catholic Relief Act, which allows persons of that religion to 'exercise any franchise or civil right' (10 Geo. IV. c. 7, s. 10). According to Bankton, 'pagans, Jews, or persons of other reprobated religions, cannot be admitted to the office' (*c*); and in one case the question was raised, but not decided, as to the capacity of a Quaker to be a tutor (*d*). It has been already seen, that the Scotch Privy Council thought 'the error of Quakerism' to be sufficient to deprive a father of the custody of his children (*e*). Professor More thinks that Bankton's doctrine is erroneous, and that religious opinion forms no ground of disqualification for the office of tutor (*f*). On this subject a reference is made to the law already stated with regard to the moral and religious opinions of *parents* (*g*).

Outlaws and aliens cannot be tutors;

3. An outlaw cannot be a tutor or curator; and as soon as a father or other guardian is so denounced, his tutorial power is at an end (*h*). 4. Aliens are incapable of being tutors (*i*), but the

(*a*) Dig. xxvi. 2, 10, ss. 2 and 3; Balf. pp. 115 and 117; Wall. p. 305; More's Notes, p. xxxv.; *Dishington* v. *Hamilton*, M. 8913 and 16227 (1558); *Findlater* v. *Findlater*, M. 16230 (1565).

(*b*) Stat. 1647, No. 247, Thomson's Ed. vol. vi. p. 276; stat. 1661, c. 8; stat. 1700, c. 3; Ersk. i. 7, 12.

(*c*) Bankt. i. 7, 17.

(*d*) *Burnet* v. *Burnet*, 2 Sup. 462 (1670).

(*e*) *Supra*, p. 78.

(*f*) More's Notes to Stair, p. xliv.

(*g*) *Supra*, pp. 77 *seq.*

(*h*) Spottiswoode's Practicks, p. 347; Bankt. i. 7, 17; Hume's Criminal Law, vol. ii. p. 270. *Forbesses* v. *Forbes*, M. 16287 (1673); and see much learned discussion as to the effects of outlawry in *Macrae* v. *Macrae*, 22 Nov. 1836, 15 S. 54; and in House of Lords, 27 June 1839, 1 M'L. and Rob. 645.

(*i*) *Donaldson* v. *Brown*, M. 4647 (1627); *Miller* v. *Allen*, M. 4651 (1792).

law recognises their paternal authority (*a*). The disability of alienage arises *ex publico jure*, and attaches to the alien on account of his connection with a foreign country, and his incapacity to possess real property within this kingdom (*b*).

nor can a firm.

5. It would seem incompetent to appoint a firm to be tutors. Where a man appointed 'the house of Messrs A. B. and Co.' to be guardians to his natural children, the Lord Chancellor said that he could not appoint a partnership to be guardians (*c*).

Females.

6. No female can be tutor-at-law (*d*); but from a regard to the will of the father, women may be nominated tutors-testamentar, if unmarried (*e*). They are also eligible to the office of tutors-dative (*f*), though some lawyers question the validity of the latter appointments (*g*). Married women cannot be tutors of any kind, even although they should be appointed by the father, under the express condition that their marriage shall not operate as a bar to their acceptance of the office (*h*). And if they shall have entered upon the duties of the office while unmarried, their right falls, *eo ipso*, by their subsequent marriage. An observation in one case fell from a learned judge, to the effect that this exclusion of married women from the office of guardianship was not the law of Scotland (*i*); but notwithstanding this opinion, it may be said that there is no single rule in this branch of law that has been so often recognised by decision (*k*), or received a more direct sanction from the

(*a*) *The King* v. *De Manneville*, 1804, 5 East 221.

(*b*) See Ersk. iii. 10, 10.

(*c*) *De Mazar* v. *Pybus* (1799), 4 Ves. 644.

(*d*) Stair i. 6, 8; Bankt. i. 7, 17; Ersk. i. 7, 12.

(*e*) Craig ii. 20, 7; Ersk. i. 7, 12. *Sandilands* v. *N.*, M. 16231 (1569), and other authorities quoted in this section.

(*f*) *A.* v. *B.*, M. 16222 (1548). Bayne's Notes, p. 28; Bankt. i. 7, 17; Ersk. i. 7, 4.

(*g*) Dirleton says: 'Though the Exchequer gives such tutories, it seems to be an error and abuse' (Dirl. *v.* Tutors). Craig also adds, that women can only be appointed tutors testamentary, 'Nam aliis tutelis excluduntur' (Craig ii. 20, 14). See also Bruce's Tutor's Guide, p. 94.

(*h*) Code v. 35, 1; Craig ii. 20, 14; Stair i. 6, 24; Bankt. i. 7, 30, and iv. 45, 126; Ersk. i. 7, 12. *Anonymous*, 1 Sup. 123 (1585); *Kerbechil* v. *Kerbechil*, M. 9585 (1586); *Stuart* v. *Henderson*, M. 9585 (1636), and other cases in this section.

(*i*) *Per* Lord Meadowbank in *Stoddart* v. *Rutherford*, 30 June 1812, F. C.

(*k*) See the following authorities, in which the point was either expressly decided or assumed to be the law:—*Sandilands* v. *N.*, M. 16231 (1569); *Anonymous*, 1 Sup. 123, and note to Mor. 16328 (1585); *Kerbechil* v. *Kerbechil*, *supra*; *Stuart* v. *Henderson*,

institutional writers (*a*). In the case referred to for the *dictum* of Lord Meadowbank the question did not relate to the appointment of a married woman as tutor, but as trustee; and it was held that she could be so appointed,—a decision which has since been regarded as authoritative and settling this point (*b*). The consideration of her eligibility as a tutor or other guardian was referred to only as an illustration; and the law was more correctly stated by other judges, the difference between the two offices being thus elucidated by Lord Glenlee: 'I conceive it to be fixed, that if a man means to make a married woman tutor or curator, it is not in his power to do so. But it is quite a different matter to make her trustee. In the one case he cannot go beyond the precise powers given by the law, and I see many reasons why a man should not be allowed to do so, and I think the rule a good and wise one; but in the case of a trustee, a man may dispose of his property as he pleases. The trust depends altogether upon his arbitrary and uncontrollable will.' And the Lord Justice-Clerk (Boyle) observed: 'There would have been a difficulty in this case if the pursuer had been appointed a tutor or curator; but here it is totally different.' As further illustrating the difference between the two cases, it may be remarked, that while there are legal tutors, there are no legal trustees. The principle upon which the law has excluded married women from the office is this: that being themselves under the curatory of their husbands, it is absurd that they should be the guardians of others (*c*). 'This,' says Justinian, in an analogous case, 'would be a detestable confounding of names and things' (*d*).

supra; *Montrose* v. *his Tutors*, M. 14697 (1688); *Aikenhead* v. *Durham*, M. 14701 (1703); *Donaldson* v. *Donaldson*, M. 16364 (1770); *Sinclair* v. *Sutherland*, 5 Sup. 634, Hailes 752 (1777); *Scott* v. *Scott*, M. 16371, Hailes 621, 5 Sup. 633 (1775); *Grant* v. *Grant*, M. 16257 (1631); *Gray* v. *Ballegerno*, M. 16296 (1678); *Vallance* v. *Forrester*, M. 16255 and 513 (1630); *Forrester* v. ———, 16254 (1630); *Langshaw* v. *Muir*, M. 16252 (1629); *Gordon* v. *Corsan*, M. 16259 (1632); *Swinton* v. *Notman*, M. 16273 (1665); *Wemyss* v. *Charteris*, M. 14702 (1733); *per* Lord Glenlee in *Stoddart* v. *Rutherford*, 30 June 1812, F. C. See *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265.

(*a*) Balf. p. 116; Craig ii. 20, 14; Stair i. 6, 10; Dirl. and Stew. *v.* Tutory, p. 446; Bruce's Tutor's Guide, p. 37; Bankt. i. 7, 30, and iv. 45, 126; Wall. p. 306; Ersk. i. 7, 12 and 29; Bell's Prin. sec. 2073. *Dictum* of Tait at footnote, 5 Sup. 634.

(*b*) *Stoddart* v. *Rutherford*, *supra*; *Stormonth and Darling* v. *Watson*, 14 Jan. 1824, 2 S. 607.

(*c*) Craig ii. 20, 14; Ersk. i. 7, 12; *Gordon* v. *Corsan*, M. 16259 (1632); Durie's Report.

(*d*) Code v. 30, 5.

Can debtors or creditors of pupil be tutors to him;

7. These seem to be all the exceptions to the general rule which admits every citizen to the office. There were, however, various other disabilities known in the Roman law, which have not yet been adopted in Scotland, but in regard to most of which there appears no reported decision. By the Roman law, a person who was either creditor or debtor of his ward, could not be its guardian (*a*). Erskine holds that this is not the law of Scotland (*b*); but in one case Professor Bell seems to have been of opinion, that the circumstance of there being complicated transactions between a tutor-at-law and a pupil was sufficient to induce the Court to exclude him from the office (*c*).

can deaf and dumb;

8. Persons deaf and dumb could not, by the Roman law, be tutors (*d*); and by the ancient law of Scotland, these persons were not only debarred from the office of tutory, but they were, like natural fools, to be subjected to the guardianship of others (*e*). The modern doctrine is very different from this. Individuals so afflicted have been found entitled to manage their own affairs like other persons, *sui juris* (*f*). Whether they would be eligible to the office of guardian, has not yet been determined.

can clergymen or persons resident in foreign country.

9. A clergyman may be a tutor (*g*). 10. It is no objection to a tutor's appointment that he is resident in a foreign country, if he be not an alien (*h*).

Where disqualified persons appointed, the others may act.

11. If individuals incapable by law to be tutors be so nominated by the father, the deed will be read, except as regards minors (*i*), as not containing their names; and the other tutors duly qualified will alone be entitled to the office, on the ground that the law presumes the father knew that the persons labouring under disability could not be tutors, and that he meant only the rest to act (*k*).

(*a*) Code v. 34, 8; Nov. lxxii. c. 2; Nov. xxxiv.

(*b*) Ersk. i. 7, 12; Bruce's Tutor's Guide, p. 33.

(*c*) *Hadden* v. *Barr*, 27 Feb. 1822, 1 S. 357; 3 Bell's Illus. 32.

(*d*) Dig. xxvi. 1, 1, 2; Dig. xxvi. 4, 10, 1; Dig. xxvi. 4, 11; Dig. xxvi. 1, 17.

(*e*) M'Ken. Obs. on 1585, c. 18; and *infra*, *v.* Guardianship of Lunatics.

(*f*) *Craigie* v. *Gordon*, 17 June 1837, 15 S. 1157.

(*g*) *The King* v. *Forrester*, M. 16217 (1529); *Wilson*, 22 Jan. 1857, 19 D. 286. See *infra*, Part v.

(*h*) *Bell* v. *Henderson*, M. 16374 (1784); *Robb* v. *Robb*, 22 Dec. 1814, F. C.; More's Notes, p. xxxv. See the case of *Hadden* v. *Barr*, 27 Feb. 1822, with Professor Bell's remarks, Illus. vol. iii. p. 32, and More's opinion of the case. Notes to Stair, pp. xli. and xxxv.

(*i*) *Supra*, p. 169.

(*k*) Bankt. i. 7, 17; Ersk. i. 7, 3; *Baird*, supplicants, M. 7431 (1711).

SECTION III.

TUTORS NOMINATE OR TESTAMENTAR.

Who may appoint tutors-testamentar.

I. The father alone is entitled to nominate tutors-testamentar. The mother has no such power, nor have grandfathers, or other ascendants, even after the father's death; and if appointments be made by these persons, they may be reduced, as in fraud and prejudice of the tutor-at-law, and failing him, of the Crown, whose right cannot be infringed upon by such illegal and inept appointments (*a*). It has been, however, sometimes said, that if any person leave property to a pupil, he is, in virtue of this gift, entitled to nominate a *tutor* to the donee (*b*). This, however, is a misapplication of the term; for whatever the person so appointed to manage the property devised may be termed in the deed, he is in reality nothing more than a mere *trustee*, a factor, or administrator of that particular property (*c*). Though the nomination is effectual to this extent, on the ground that any one who makes a gift is entitled to have it managed in any way he thinks fit (*d*), yet it does not exclude the father from being his child's tutor and administrator to all other purposes. Nor would it prevent him from appointing tutors-testamentar to administer the remainder of the pupil's estate, and to have the custody of his person (*e*). The chief authorities against the unanimous *dicta* and decisions of our ancient law are two decisions, by which it was found, that 'tutors' appointed by others than the

(*a*) Stair i. 6, 6; Bankt. i. 6, 9; Ersk. i. 6, 55, and i. 7, 2; Hutch. Just. vol. ii. p. 256; *King* v. *Oliphant*, M. 16216 (1528); *Kilgour* v. *N.*, M. 16233 (1575).

(*b*) Craig ii. 20, 7; Dirl. and Stew. p. 446; *Dishington* v. *Hamilton* (1558), M. 8913.

(*c*) Stair i. 6, 6; Bankt. i. 7, 7; Ersk. i. 7, 2. See these cases, *Kirktons* v. *Hunthill*, M. 12531 (1665); *Dick* v. *Nearest Agnates*, M. 16235 (1589); *Charteris* v. *King's Advocate*, Elch. *v.* Tutors 22, 5 Sup. 770, M. 7283 (1749), Cr. and Stew. p. 463 (1750); *Scott* v. *Kennedy*, Mor. 8970 and 16291 (1675); Bell's Prin. sec. 2073.

(*d*) Stair, *ibid.*; More's Notes, xxxv.; Dirl. and Stew. p. 446; Ersk. i. 6, 55; Bell's Illus. vol. iii. p. 58, in regard to the case of *Scott* v. *Kennedy; Dick* v. *Nearest Agnates, supra*. 'Certæ autem rei vel causæ *tutor* dari non potest; quia personæ non causæ vel rei tutor datur.'—Inst. i. 14, 4.

(*e*) *Gadgirth*, M. 16240 (1611); *Scott* v. *Kennedy*, M. 8970 and 16291 (1675). See both reports, Stair i. 6, 6; Bruce's Tutor's Guide, pp. 54–5, correcting Dirl. p. 446. See also Ersk. i. 7, 13.

father must make up tutorial inventories in the same manner as the father's nominee (*a*). This is a formality to which mere trustees are not subject; and accordingly Professors Bell and More have doubted the soundness of these two decisions (*b*). The question was also raised, but not decided, in a case where the tutors appointed were also named trustees, and as such were made personally liable for loss on trust transactions (*c*). The donor might, no doubt, indirectly compel the father to submit to his nominees the entire guardianship and education of his son, by declaring that the donation shall only be effectual on that condition (*d*). Whether the father could reject such a donation, as being clogged with a qualification which infringes one of his most unquestioned privileges, has not been determined. If he could do so at common law, it might form a question how far the Court of Session as a court of equity could interfere so as to protect the interests of the child, who would be hurt by his father's rejection of the gift. In one case it does not appear to have been doubted but that the Court could interfere (*e*).

To whom may tutors-testamentar be appointed.

II. A father can nominate tutors to his lawfully born children, or to posthumous issue lawfully begotten (*f*); but not to bastard children, though he may leave property to them under condition that it shall be managed by a party appointed by him, and that the children's custody and education shall be as he may direct. The manager so appointed would not, however, be a tutor: he would be a factor or trustee (*g*); and the child on arriving at puberty might choose curators for himself, notwithstanding his father's nomination (*h*), though he might thereby forfeit the gift, seeing that it was bestowed upon him conditionally.

(*a*) *Kilpatrick* v. *M'Alpine*, M. 16381 (1793); *Hamilton* v. *Hawkins*, 10 March 1790, cited in Kilpatrick, and see Hume Sess. Papers, Adv. Lib 'Winter 1789–90,' No. 118, with MS. notes. In these cases the appointment was made by a grandfather; and even if the statute should be held to apply to such a case, it would not follow that tutors appointed by an entire stranger should fall under the same rule.

(*b*) Bell's Illus. vol. iii. p. 28; More's Notes, pp. xxxv. xxxvi.

(*c*) *Moffat* v. *Robertson*, 31 Jan. 1834, 12 S. 369.

(*d*) *Charteris* v. *King's Advocate*, *supra*, p. 174, as in (*c*).

(*e*) *Charteris*, *ibid.* See Macpherson on Infants, p. 135, for the English law.

(*f*) Craig ii. 20, 7; Bankt. i. 7, 2; Erak. i. 7, 2; *Murray* v. *Marshall*, M. 16226 (1555).

(*g*) *Johnston* v. *Clark*, M. 16374 (1785); *supra*, pp. 122 *seq.* and 165.

(*h*) *Wilson* v. *Campbell*, 10 March 1819, F. C.

How and when are tutors appointed.

III. Tutors-nominate are generally appointed in the last will and testament of the father; but the nomination may be effectually made by any deed, whether *inter vivos* or *mortis causa*, which sufficiently indicates the father's will (*a*). The parties need not be expressly named *tutors:* for if appointed '*governors*,' they are held to have been effectually nominated tutors-testamentar (*b*); and 'an ordinance of the father in his testament, that his son being seven years old, should be delivered to his brother, to be brought up at school, was found to be a valid tutory testamentar' (*c*). Although the deed of nomination be an *inter vivos* deed delivered, it is still ambulatory, and may be revoked by the father at any period of his life, even upon deathbed (*d*). It is also competent for him to make the nomination in the last moments of life (*e*). But the rule is different with regard to curators, who must be so nominated *in liege poustie*, according to the statute 1696, c. 8, which first gave the father power to appoint such guardians; and although it also mentions *tutors*, the restriction is not held to apply to his nomination of these, because it was at all times competent for the father to name tutors at common law, even on deathbed; and this power was not *revoked* by the statute (*f*).

Forms of nomination.

Tutors-testamentar are nominated in various forms: simply; jointly; when a quorum is appointed; and lastly, where there is a *sine quo non*.

Simple and joint nominations. Nomination of two or more, and one fail.

1. Where the father appoints more than one to be tutors to his children, without adjecting any qualification as to their mode of acting, the nomination is simple; and though all but one should decline to accept, or, after having accepted, should fail by death or otherwise, the nomination will subsist in the person of the accepting and surviving tutor (*g*). A nomination of one set of tutors, *whom failing* others, means 'not only failing by death after acceptation,

(*a*) Stair i. 6, 6; Bankt. i. 7, 6; M'Ken. i. 7, 3; Ersk. i. 7, 2; 2 Jurid. Styles 466.

(*b*) *Nimmo* v. *Robertson*, M. 16239 (1610).

(*c*) *Forbes* v. *Caithness*, M. 16241 (1613).

(*d*) Stair i. 6, 6; Bruce, p. 54; Ersk. i. 7, 2; *Scott* v. *Wilson*, 1773, Hailes, p. 528, M. 6585.

(*e*) Ersk. i. 7, 2; *Arg. Walkinshaw* v. *Gray*, M. 16348, 4049; Elch. *v.* Tutors, No. 18, and notes to the decision (1743). Correct More, p. xxxv.

(*f*) Ersk. *ibid.*

(*g*) Stair i. 6, 14; Dirl. and Stew. p. 445; Bankt. i. 7, 20; Ersk. i. 7, 30; *Fairside* v. *Adamson*, M. 14692 (1609); *Lord Airth* v. ———, M. 14692 (1602); *Fisher* v. *Tutors and Curators*, M. 16361 (1758); *Ruthven*

but failing any way' (*a*); and if the first nominees be two or more, the substitution does not take effect until all the parties first named shall have failed (*b*). In a case reported by Kilkerran, it was found that 'where A. and B. are appointed tutors, without expressing them to be joint tutors, though one of them should not accept, the office would subsist with the other; for, to make a joint nomination, it must be expressed that they are to be joint tutors' (*c*). It has been held, that under a testamentary deed, in which trustees are appointed, the condition of survivorship is implied, on the principle that a truster prefers that any one of the trustees nominated should manage the estate rather than a judicial factor; and a petition for the appointment of a judicial factor on the failure of one of two trustees was refused as unnecessary (*d*). In a subsequent case, where the Court held the nomination to be joint, they seem to have proceeded on the specialty of its being a trust for behoof of creditors (*e*).

The principle on which a nomination of testamentary tutors was held to imply a condition of survivance, has been thus explained authoritatively in the House of Lords: 'The reasons upon which the decisions appear to have proceeded, are such as from their nature are exclusively applicable to and drawn from the circumstances of the appointment of tutors-testamentary. These reasons have reference to the will of the father and his *delectus personæ* (the return of the mandate being in this case excluded by the decease of the mandant)—the necessity of attending to his last will—the

v. ———, M. 16240 (1611); *Elies* v. *Scott*, M. 14695 (1672); *Muir* v. *Kincaid*, M. 16250 (1628); *Young* v. *Watson*, Mor. 16346; Elch. *v.* Tutory, No. 13 (1740). From Elchies' notes to this case, it would appear not to have been finally decided.

(*a*) *Douglas* v. *Carmichael*, M. 16314 (1693).

(*b*) Ersk. i. 7, 30, *in fin.*; *Fisher* v. *Tutors*, *supra*.

(*c*) *Young* v. *Watson and Syme*, M. 16346 (1740). See also Ersk. i. 7, 30; Ivory's note to Ersk. iii. 3, 34, No. 141; *Fairside*, *Airth*, and *Ruthven*, *supra*; *Hospital of Largo* v. *Wemyss*, M. 14722 (1680); *Campbell* v. *Monzie*, M. 14703 (1752); *Campbell* v. *M'Intyre*, 12 June 1824, 3 S. 126.

(*d*) *Findlay and Others*, petrs., 30 June 1855, 17 D. 1014. See also *Morrison* v. *Maclean's Trs.*, 27 Feb. 1862, 24 D. 637, where six out of eight trustees having resigned after an adverse verdict, it was laid down as undoubted law, that the remaining two were entitled to move for a rule to show cause why there should not be a new trial; and on appeal, the judgment on this and other points was affirmed with costs (H. L., 9 May 1865).

(*e*) *Dawson* v. *Stirton*, 4 Dec. 1863, 2 Macph. 196.

impossibility of recourse to him in changed circumstances—the preference to be given to whomever he shall have deliberately selected—the exclusion in favour of those appointed by him of all, either tutors-at-law or tutors-dative; and as arising from all these topics, the propriety of preferring any one of those appointed by the father, even though the others should cease to act' (*a*). And again: 'As concerns tutors-testamentary, regard being so constantly and exclusively had to the will of the parent,—the will of the parent being according to the civil law (and which is the foundation of the whole of the Scotch law upon the subject) the governing rule of the Court,—it is followed into all its consequences and ramifications; and, accordingly, that is the point upon which all the cases relied upon by Lord Stair are built—namely, that the ultimate decision and choice by the father is to be preferred in all cases where any portion of it remains, and where even one part of it remains, though the other part is taken away. Though you may say, *non constat*, that he should have appointed one, if the other had not been added, yet it was for him to state the difference —it was for him to state the jointure—it was for him to say *sine quo non* or *sine quibus non;* and as he has not said so, the Court will assume that he preferred even one of those, if all could not be had, to any other person whom the law might appoint, or whom the Court might appoint.'

In joint nominations all must accept.

2. A nomination, in order to be *joint*, must be so expressed. In construing such a nomination, there is no room for presumption or conjecture. If one of the persons fail, the whole is at an end. Each tutor is a *sine quo non.* And this applies not only to the case where the failure happens by death after acceptance, but also to declinature on the part of any one to accept. Such is the general rule (*b*); but this may be modified by the terms of the appointment, which may only apply the qualification to failure after acceptance. In one case, it was thought that if one of the tutors *predecease* the

(*a*) *Per* Lord Brougham in *Scott* v. *Stewart*, 7 April 1834, 7 W. S. 237.

(*b*) Stair i, 12, 13 and 14; Dirl. and Stew. p. 445; Bankt. i. 7, 20; Ersk. i. 7, 30; Bell's Dict. *v.* Tutors. *Per* Lord Pitfour in *Scott* v. *Scott* (1775), Hailes, p. 621, M. 16371, 5 Sup. 633; *Drummond* v. *Bothkennel*, M. 14694 (1671); *Blair* v. *Ramsay*, M. 14702, 5 Sup. 633 (1735), overruling *Stewart* v. *Kirkwood*, M. 14693 (1621).

father, the nomination subsisted in the others (*a*). On the failure of a joint nomination, by the death or non-acceptance of any one of the tutors, the Court will not declare the office to subsist in the rest, but will allow it to fall to the tutor-at-law, or other person to whom the common law would give it (*b*).

Quorum of tutors appointed.

3. The father may name a certain number to be a quorum, whose deeds will be as valid as if the consent of all were interponed to the acts of administration which they authorize. Where nothing is said as to a quorum, it has been held that trustees may act by a majority; and accordingly an action for the protection of the trust estate was sustained at the instance of the beneficiaries under a marriage contract and two out of four trustees, one of the other trustees being a defender, and the remaining trustee refusing to concur (*c*). If tutors are appointed, 'or the major part of the acceptors,' a quorum of three is constituted as effectually as if it had been expressly declared, since under such a nomination there must, *ex necessitate*, be more than two (*d*). A quorum fails by the requisite number declining to accept, or failing after acceptance (*e*).

Tutors appointed *sine quibus non*.

4. One or more persons may be appointed out of a number of tutors, without whose consent no act of administration will be valid, and upon whose death or secession from the office the entire nomination falls. They are hence called *sine quibus non* (*f*). If all the other tutors fail except the *sine quo non*, the nomination is at an end, because a *sine quo non* implies the existence of other tutors with less powers (*g*). So, on the other hand, when there is no specialty, such as by a clause declaring the continuance of the nomination under all circumstances, and the *sine quo non* should

(*a*) *Scott* v. *Scott*, Hailes, p. 621.

(*b*) *Dictum* in *Drummore* v. *Somerville*, M. 14703 (1742). See also *Donaldsons*, M. 16364 (1770); *Scott* v. *Scott*, M. 16371, 5 Sup. 633, and Hailes, p. 621 (1775); *Ramsay* v. *Maxwell*, M. 14695 (1672); *Primrose* v. *Roseberry*, M. 16335 (1715); *Blair* v. *Ramsay*, M. 14702, 5 Sup. 633 (1735); Ersk. i. 7, 30.

(*c*) *Blisset's Trs.* v. *Hope's Trs.*, 7 Feb. 1854, 16 D. 482. See particularly the interlocutor of Lord Ordinary and the opinion of the Lord President.

(*d*) *Primrose* v. *Roseberry*, M. 16335 (1715).

(*e*) *Blair* v. *Ramsay*, M. 14702, 5 Sup. 633 (1735).

(*f*) Ersk. i. 7, 30; *Aikenheads* v. *Durham*, M. 14701 (1703); *Blair* v. *Ramsay*, *supra*.

(*g*) *Primrose*, *ibid.*; *Blair* v. *Ramsay*, *supra*.

fail by declinature to accept, by renunciation after acceptance, by death, or, if a woman, by her marriage, the entire nomination is void (*a*); and a tutor-at-law, or tutor-dative, or factor *loco tutoris*, will be appointed (*b*). The mode of obviating this, is to declare that the tutory should subsist even after the death, incapacity, or non-acceptance of the *sine quo non* (*c*). The general rule may be overturned by the specialties of each case. If it appear from the deed of nomination that it was the father's intention that, notwithstanding the failure, the nomination should subsist in the rest, the Court will give effect to such intention, and sustain the nomination in the others (*d*). In one case the general rule was thus stated: 'The Lords unanimously considered it as clear law, notwithstanding of certain decisions to the contrary, that the failing of the quorum or *sine quâ non* sopites the nomination; and the case would be the same of the failure of one of more tutors or curators named jointly. The reason in all these cases is the same, that the father seems to have put no trust in the rest without the quorum or without the *sine quo non*, or in any one or more of tutors named jointly without the whole' (*e*).

Privileges under which tutors-testamentar may be appointed.

IV. Tutors-testamentar are entitled to various privileges denied to other guardians; because, in selecting them, the father is understood to have satisfied himself of their personal honour, and of the sufficiency of their fortunes. Hence they require no service or other judicial proceeding prior to their entrance on the office (*f*). They are not obliged to take the oath *de fideli* (*g*); nor to find

(*a*) *Kinnaird*, petr., 3 Sup. 343 (1680); *Ramsay* v. *Maxwell*, M. 14695, 2 Sup. 617 (1672); *Montrose* v. *Tutors*, M. 14697 (1688); *Aikenheads* v. *Durham*, M. 14701 (1703); *Drummore* v. *Somerville*, M. 14703 (1742); *Johnston* v. *Crawford*, Elch. *v.* Tutors 23, and notes (1751); *Sinclair* v. *Sutherland*, 5 Sup. 634, Hailes 752 (1777).

(*b*) The Court have no power to authorize the remaining tutors to act, on the failure of the *sine quo non*; but if the tutor-at-law refuse to serve, or a tutor-dative is not appointed, the Court will nominate a factor *loco tutoris* to discharge the duties. *Supra*, p. 179 (*b*), and *Donaldsons*, M. 16364 (1770); *Blair* v. *Ramsay*, M. 14702 (1735); *Montrose* v. *Tutors*, *supra*; *Aikenheads* v. *Durham*, *supra*.

(*c*) *Aikenhead*, *ibid.*; *Drummore*, *supra*; *Scott* v. *Scott*, M. 16371, 5 Sup. p. 633, Hailes, p. 621 (1775).

(*d*) *Scott* v. *Scott*, *ibid.*; *Drummore* v. *Somerville*, *supra*; *Sinclair* v. *Sutherland*, 5 Sup. 634, Hailes 752 (1777). See an illustration in *Forbes* v. *Galloway*, M. App. *v.* Solidum 2; aff. 5 Paton 226 (1808).

(*e*) *Drummore* v. *Somerville*, *supra*.

(*f*) *Dishington* v. *Hamilton*, M. 16227 (1558); Stair i. 6, 6.

(*g*) Stair i. 6, 6; Ersk. i. 7, 3.

caution (*a*), unless where insolvent, or clamant suspicions exist as to their honesty; in which cases the Court of Session will, on application made to them by any relative, ordain them to find security (*b*). But they must, like all others, make up tutorial inventories; and no dispensation from the father can free them from this indispensable duty (*c*). By the common law they are liable, like all other tutors, for omissions as well as intromissions; and that *in solidum* (*d*). 'But this having frightened many from accepting the office, and thereby several pupils being left destitute' (*e*), the statute 1696, c. 8, was passed, by which it was enacted, that the father might nominate tutors, with the qualification 'that they shall not be liable for omissions, but for their actual intromissions with the means and estate *descending from the father*,' 'and that each of them shall only be liable for himself, and not *in solidum* for others.' These privileges, it was, however, declared, might be controlled; for the Court of Session will compel the tutor so named to find caution, on suspicions arising as to his honesty or solvency. Though fathers are entitled to nominate testamentary tutors even on deathbed, they cannot, according to the statute, exempt them from the common law responsibilities, except *in liege poustie* (*f*). Further, the deed of nomination must *expressly* exempt the tutors. —This subject is more fully considered hereafter, in treating of the diligence prestable by tutors (*g*).

(*a*) Craig ii. 20, 7; Stair i. 6, 6; Ersk. i. 7, 3; Bankt. i. 7, 5; *Douglas* v. *Carmichael*, M. 16314 (1693).

(*b*) Spottiswoode Practicks, *v.* Tutors; Ersk. i. 7, 3. Opinion of Fountainhall, 3 Sup. 57; *Douglas* v. *Carmichael*, *supra*; *Callendar* v. *Linlithgow*, M. 14701 and 16314 (1693); *Balfour* v. *Forresters*, M. 16320 (1705); *Govan* v. *Richardson*, M. 16263 (1633). This is the rule of the common law as laid down by Erskine, who is charged by Brodie with carelessness in overlooking the enactment to this effect in the Act 1696, c. 8 (Brodie's Stair i. 6, 7). The provision in that Act, however, authorizing the Court to compel tutors-testamentar to find caution, only applies to tutors appointed with the privileges it confers, and does not affect the common law as to tutors appointed without these privileges, who will be ordained to find caution on the ground of the common law.

(*c*) Read the reservation in 1696, c. 8, in connection with 1672, c. 2, and Bankt. i. 7, 6 and 23; More's Notes, p. xxxv.; *Lothian* v. *Somerville*, M. 16337 (1724). See Code v. 51, 13, 1, *in med.*; and see *infra*, on Tutorial Inventories, p. 197 *seq.*

(*d*) See *infra*, Part i. Div. ii. chap. iv.

(*e*) Bruce, Tutor's Guide, p. 58.

(*f*) Ersk. i. 7, 27; Bell's Prin. s. 2072; *Watson* v. *Watson* (1714), M. 3244; *Johnston* v. *Crawford* (1751), M. 3230, and Elch. *v.* Tutor 23.

(*g*) *Infra*, Div. ii. chap. iv.

Testamentary tutors preferred to others.

Testamentary tutors are preferred to all others (*a*). Hence they may accept the office even after an interval of years from the father's death, and exclude any tutor-at-law or dative who may in the interim have been appointed to the management, unless it can be shown that the interference of the tutor-nominate at that late stage will be productive of injury to the pupil (*b*). As this right on the part of the tutor-testamentar bears with some oppression even upon the pupil (*c*), the latter, or any co-tutor, or relative of the pupil, may institute an action in order to obtain a decree decerning the tutor-testamentar to accept the office or to renounce (*d*). A tutor-at-law wishing to serve, in a case where the tutor-testamentar has not indicated his intentions, or declined, may debar him from afterwards accepting, by rendering him a party to his service, without the necessity of a formal action (*e*). After a tutor-testamentar has once declined to accept, he cannot at any future time demand the office as against the tutor-at-law or tutor-dative (*f*); but the declinature must be explicit (*g*).

Factors appointed by the father.

V. Along with tutors-testamentar, a father may also appoint a factor under them, who cannot be removed by the tutors without just cause (*h*).

(*a*) Ersk. i. 7, 3; Balf. p. 114; Stair i. 6, 7. *Wood* v. *Monypenny*, M. 16226 (1557); *Sinclair* v. *Gordon*, M. 16221 (1551); *Ruthven* v. ——, M. 16240 (1611); *Auchterlony* v. *Oliphant*, M. 16258 (1631); *Ramsay* v. *Dalhousie* (1688), M. 16313. One of the earliest of the civilians thus explains the principle: 'Tutelæ procedunt ad modum hereditatis, id est, jus hereditatis sequuntur; ut ergo spes hæredis instituti excludit venientem ab intestato, ita testamentarius excludit legitimum venientem a lege.' Also Dig. l. 17, 89, de Reg. Jur.

(*b*) Stair i. 6, 7; Ersk. i. 7, 3; *Campbell* v. *Campbell*, M. 16246 (1627); *Auchterlony* v. *Oliphant*, *supra*; *Irvine* v. *Elsick*, M. 16260 (1632); *Cross* v. *Fleming*, 24 Jan. 1804, not reported, but papers in Hume Sess. Papers, Adv. Lib. vol. titled 'Winter 1803–4,' No. 13.

(*c*) Elchies' Annotations, p. 33.

(*d*) More's Notes to Stair, p. xxxvii. See these cases, where such an action was raised: *Baird* or *Duff* v. *Chalmers*, M. 16253, Durie's report (1630); *Muir* v. *Kincaid*, M. 14694 (1628); *Callendar* v. *Linlithgow*, M. 14701 (1693); *Montrose* v. *Tutors*, Mor. 14697, 1 Sup. 254 (1688).

(*e*) Ersk. i. 7, 4.

(*f*) Bankt. i. 7, 5; *Campbell* v. *Campbell*, M. 16246 (1627).

(*g*) *Ramsay* v. *Dalhousie*, M. 16313 (1688).

(*h*) *Tutors of Straiton* v. *Gray*, M. 16348 (1743); *Walkinshaw* v. *Gray*, M. 4049 (1743); Elchies' Decisions, *v.* Tutors, No. 18, and notes. See a case as to a similar appointment of a factor to trustees, *Fulton* v. *M'Alister*, 15 Feb. 1831, 9 S. 442.

SECTION IV.

TUTORS-AT-LAW.

If there be no tutors-testamentar, or if they have declined, or failed after acceptance, or become incapacitated to accept or act, then there is room made for the appointment of a tutor-at-law, who is so termed, because he takes the office by the disposition of the law itself (*a*).

Who may be tutors-at-law.

I. A tutor-at-law is the nearest male agnate to the pupil, and must, by express statute, be of the full age of twenty-five years, and qualified in other respects, as stated in the brieve of tutory, afterwards considered (*b*). It would seem to be no objection to a tutor-at-law that he is resident without the jurisdiction of the Court (*c*), nor that he is of great age (*d*). But over his appointment, as over that of all other guardians, the Court may exercise a judicial control, and will prevent it taking place, or remove him from the office after appointment, if his character or circumstances should render this necessary (*e*).

Meaning of the terms agnate and cognate.

The terms agnate and cognate, as used in the Roman and Scotch laws, have been sometimes misunderstood (*f*), and the definitions of Scotch writers are somewhat vague in regard to them.

By the ancient law of Rome, the term agnate denoted a person connected with another through *males* only, without the intervention of a single female; so that a paternal uncle and the son of a paternal uncle were agnates. On the other hand, though the word *cognati*, when taken in its broadest meaning, included *all persons* joined to each other by blood, yet when opposed to agnates it meant that species of relationship which exists between two individuals through the intervention of one or more females; and this

(*a*) Balf. p. 114; Craig ii. 20, 7; Stair i. 6, 8; Ersk. i. 7, 4.

(*b*) Balf. p. 117; Stair i. 6, 8; Bankt. i. 7, 8; *King* v. *Forrester*, M. 16217 (1529); Ersk. i. 7, 4.

(*c*) *Supra*, p. 173.

(*d*) *Bell* v. *Henderson*, M. 16374 (1784).

(*e*) *Hadden* v. *Barr*, 27 Feb. 1822, 1 S. 357; *Dishington* v. *Hamilton*, M. 8913 and 16227 (1558). More's Notes, p. xli.

(*f*) Blackst. Com. lib. ii. c. 14, s. 7.

although the relationship were through the father. By the Roman law, all persons related to each other through the *mother* would certainly be cognates; but the son of a *paternal* aunt would also be a cognate, though she herself would be an agnate: because, *first*, in order to connect her nephew with her son, there is a female interposed, namely herself; and *secondly*, with regard to herself, there is no interposition of females. A sister and brother, in like manner, were agnates, the medium of conjunction, viz. their father, being a male (*a*). But although females might thus be agnates, yet they were excluded from the office of tutory by another principle, viz. that this was an *officium virile*. All cognates were, according to the early policy of the Romans, jealously excluded from the office (*b*), and members of the same clan or *gens* (*gentiles*), who were always related to each other through the male sex, were preferred to the succession and the office of tutory before a cousin, if he were the son of an *aunt* and not of a *paternal uncle* (*c*). This distinction between cognates and agnates Justinian took away by the 118th Novel, c. 5. He called to the succession, and to the consequent burden and duty of guardianship, not only kinsmen related through the father, but also those related through the mother.

The law of Scotland adopts the rule of the early Roman law, that agnates alone are eligible to the office; but agnates, by our law, are persons, male or female, related to each other through the father, although females intervene (*agnatus, i.e. consanguineus ex parte patris*); cognates, all persons, whether male or female, related through the mother. And thus kinsmen through the father may be tutors by our law, although not agnates in the sense of the Roman lawyers (*d*).

Order in which agnates are preferred to the office of tutor.

An agnate nearer in degree, but by the half blood, is postponed, to a more remote agnate who is of the full blood. The grandson of a sister-german was preferred over the son of a consanguinean sister, because the grandson in this case would be

(*a*) Inst. i. 15, 1, with Vinnius' Commentary; Dig. xxvi. 4, 6 and 7, with the remarks of Bockleman, vol. ii. p. 214, who states the law on the subject very clearly.

(*b*) Dig. xxvi. 4, 6.

(*c*) Ulpian Frag. tit. xxvi. s. 1; Heinec. Com. ad Inst. No. 220, with the notes; Noodt Opera, vol. ii. p. 547, and authorities there cited.

(*d*) Balf. pp. 115, 117; M'Ken. i. 7, 4; Bankt. i. 7, 12; Ersk. i. 7, 4.

the nearest heir in heritage (*a*). Where there are several agnates in the same degree, that one is preferred who would be heir-at-law to the pupil; and if that person be not duly qualified from want of age or otherwise, *he* will be preferred who is the nearest to the succession thereafter. Thus, if the middle brother of three should die, leaving several children pupils, though the second of these pupils would be the nearest agnate of his eldest brother or sister, yet he could not be appointed to the office from want of age (*b*). And although the two uncles are agnates, and stand in the same degree of relationship to their nephews, yet the youngest would be preferred to the office, as being the pupil's heir-at-law (*c*). Where the sole property of the pupils is moveable, to which a number of agnates may equally be heirs at the same time, the rule still holds that the nearest heir-at-law in heritage is the party entitled to the office. Where the nearest agnate is duly qualified in terms of law, but declines to accept the office, the next agnate cannot serve; but a tutor-dative or factor *loco tutoris* must be appointed (*d*).

To whom may tutors-at-law be appointed.

II. It is to lawful children only that a tutor-at-law can be served. A bastard can have no tutor-at-law, because he has no agnate or kinsman on the father's side (*e*). The remedy for this is a tutory-dative, or the appointment of a factor *loco tutoris*.

How tutor-at-law appointed.

III. The tutor-at-law is vested in the office by means of a service, and he is preferred to the tutor-dative. But this preference is limited to a year and day from the time at which he might have served; that is, a year and day from the father's death, or the birth of a posthumous child, or the failure of testamentary tutors (*f*). After the expiry of this period a tutor-dative may be nominated; and in several cases it has been held that the tutor-at-law could not thereafter claim the office, so as to supersede the tutor-dative (*g*).

(*a*) *Moncreiff* v. *Maxwell*, M. 6286 (1710).

(*b*) Act 1474, c. 51; Bankt. i. 7, 13; Ersk. i. 7, 5.

(*c*) Spottiswoode's Practicks, p. 343; Ersk. i. 7, 5.

(*d*) See *Bower*, M. 8910 (1750). See *Graham* v. *Dickson* (1590), M. 16236.

(*e*) Balf. p. 117; Craig ii. 20, 7; *A.* v. *B.*, M. 16219 (1534).

(*f*) Balf. pp. 115, 118; Craig ii. 20, 7; Stair i. 6, 9, with Brodie's note; Bankt. i. 7, 8; M'Ken. i. 7, 5. *Davidson* v. *Studeman* (1553), M. 16223; *Graham* v. *Dickson* (1590), M. 16236; *Grant* v. *Grant* (1631), M. 16257; *Irvine* v. *Elsick* (1632), M. 16260; *A.* v. *B.* (1632), M. 16261; *Gray* v. *Ballegerno* (1678), M. 16296; *Ker* v. *Logie* (1665), M. 16271.

(*g*) *Wemyss* v. *Clepane* (1551), M.

But if, again, a tutor of the latter kind had not been appointed, it is competent for the tutor-at-law to take up the office at any time; and if his service had been retoured, he would be preferred even to a tutor-dative appointed, although he had not found caution within the year, if he offered it when called upon afterwards (*a*). A year and day appears to have been a period fixed upon as sufficient to allow the tutor to determine whether or not he was inclined to assume the burdens of the tutorial office. Professor More is of opinion that all the old authorities on the point are superseded by a modern decision (*b*), and that the tutor-at-law may claim the office at any time. The case referred to was one relative to a factor *loco tutoris* (*c*), whose office is at all times considered one of interim administration (*d*), and cannot be quoted, therefore, as a decision overturning all the prior authorities on this subject as to tutors-dative.

Mode of conducting the service.

The claimant for the office procures (in terms of our ancient statute law) (*e*) a brieve from Chancery, directed to a Judge Ordinary, desiring him to ascertain by means of an inquest certain facts to be immediately explained. This brieve need not be directed to the Judge Ordinary of the bounds where the pupil resides. Any judge in Scotland having jurisdiction in services is competent (*f*). The brieve is executed edictally by an officer of court, at the market-cross of the place of service. Sometimes it is executed personally against tutors-nominate who have not accepted (*g*). The diet for service is peremptory; and so, if the claimant does not appear to proceed with the service, the judge

16223; *Erskine* v. *Wilson* (1670), 1 Sup. 611.

(*a*) *Irvine* v. *Elsick*, and *A.* v. *B.*, *supra*, overruling *Craig* v. *Johnstone* (1574), M. 16231. In *Riddell* v. *Riddell* (1669), M. 16281, the tutor-dative was preferred, though the tutor-at-law offered to find caution, because, though served, he had lain by for four years, and had not acted.

(*b*) More's Stair, footnote to page 46, and Dissertation at the end; Notes, p. xxxvi.

(*c*) *Bell* v. *Henderson*, M. 16374 (1784).

(*d*) See Mr More's own explanation of the nature of the appointment of a factor *loco tutoris;* footnote to Stair i. 6, 11.

(*e*) 1474, c. 51.

(*f*) Stair i. 6, 9; Macken. Inst. i. 7, 4, and Obs. on Stat. 1585, c. 18; Ersk. i. 7, 6; *Stewart* v. *Henderson*, M. 9585 and 16266 (1636). Dirleton (v. Tutory) doubted this, and he had some foundation for it in one case, *Wood* v. *Monypenny*, M. 16226 (1557). But the rule is now settled as in the text.

(*g*) *Supra*, p. 182.

cannot adjourn it to another day (*a*). A caveat is sometimes lodged in Chancery by a party intending to object, in order to obtain timely notice of the service. On the day of compearance, an inquest of fifteen (*b*) men are sworn to ascertain the points of the brieve. The claimant presents to them a claim of service, signed by himself or his mandatary, which sets forth, *first*, that he is nearest agnate to the pupil, past the age of twenty-five years complete (*c*); *secondly*, is careful and provident of his own affairs; and *thirdly*, is (or is not) entitled immediately to suceeed to the pupil if he shall happen to die leaving no children. Proof is only adduced of the first head of the claim. The second is presumed; and that as to the succession is left to the decision of the courts of law. The last head of the brieve relates to the custody of the pupil, and is taken no notice of in the claim of service; it must also be settled by a court of law (*d*). With regard to the competency of opposing the service, the authorities are discordant (*e*). It does not seem to be quite clear whether evidence against the claim can be led before the inferior judge; but if the service be advocated to the Court of Session, the case will proceed before one of the judges and a jury; and any party having interest may bring forward contradictory evidence on every head of the brieve (*f*). In one case, after opposite evidence had been led, the verdict of the jury was adverse to the claimant, inasmuch as they found him not provident of his own affairs, nor able and capable to manage the affairs of others (*g*). If the verdict

(*a*) Stair iv. 3, 17; Bell's Prin. sec. 1828; *Sutherland* v. *Grant*, M. 16347, Elch. *v.* Tutor 17, and notes (1743).

(*b*) This is the ordinary number; but Erskine (iii. 8, 59) is in error in stating that this number has been sanctioned by any continuous practice. Inquests of nine, eleven, thirteen, have been sustained even after Erskine's time. Wight on Election Law, p. 163; *Stewart* v. *Dalrymple*, M. 8579 (1761), affirmed. *Stewart* v. *Maxwell*, M. 8591 (1762).

(*c*) In an old case, it was held that the king might dispense with the objection of minority, and authorize service as tutor, if he be yet of 'sufficient judgment and qualities.' *Henryson* v. *Henryson* (1548), M. 8913.

(*d*) 1 Jurid. Styles, pp. 421–2; Bell's Forms, vol. iii. p. 238; Bankt. i. 7, 11; Ersk. i. 7, 6.

(*e*) Ersk. i. 7, 6; Wal. p. 313. The history of brieves has been given at length by Craig ii. 17, 25; Stair iv. 3, 4 *seq.*; and Kames' Law Tracts, No. 8.

(*f*) *Miller* v. *Sawers*, 5 June 1841, 3 D. 996, F. C.; and *Godwin* v. *Sawers*, 24 June 1842, 4 D. 1451.

(*g*) *Ibid.*

should be adverse to the claimant, the matter is not *res judicata* against him; but he may at any time thereafter procure a new brieve from Chancery, and endeavour to induce a new inquest to serve him (*a*). When it is favourable, the clerk of Court makes out the retour of the service, which is retoured to Chancery. Without being so retoured, the whole proceeding is inept, and the party is not tutor-at-law (*b*).

Cautioner for tutor.

Before delivering up the retour, the clerk to the service must obtain from the tutor a bond of caution that he shall hold just count for his intromissions (*c*), and fulfil the other obligations prescribed by the Pupils' Protection Act (12 and 13 Vict. c. 51, sec. 26), otherwise the clerk himself will be liable as cautioner, if the tutor have retoured the service to Chancery, obtained a gift of tutory, and proceeded to mismanage (*d*). The cautioner must be habit and repute responsible, and the *onus probandi* in regard to this lies upon the clerk. It would seem that if the sufficiency of the cautioner is attested by a justice of the peace, the clerk is free from responsibility (*e*). The bond is transmitted with the other steps of procedure to the Director of Chancery, who transmits it to the accountant of Court (12 and 13 Vict. c. 51, sec. 26). The tutor has no power to act till he find caution for his intromissions (*f*); but although caution be not found, he is liable for maladministration and neglect, as a tutor would be (*g*). Should the tutor be unable to find caution, tutors-dative may, after a short delay, be appointed (*h*). The caution will be received at any time, unless it can be shown that the pupil would be injured by its

(*a*) *Per* Lord Moncreiff in *Miller* v. *Sawers*, 5 June 1841, F. C.; *per* Lord Medwyn in *Gifford* v. *Gifford*, 17 Feb. 1837, 12 F. App. p. 92 *seq.*

(*b*) Ersk. i. 7, 7; *Liddell* v. *Ure*, M. 16353 and 13964, and Elch. *v.* Tutors and Curators, No. 20 (1748); More's Notes, p. xliv.

(*c*) Bankt. i. 7, 8; Ersk. i. 7, 7. See the form 1 Jurid. Styles, p. 423, 4th ed. vol. i. p. 303.

(*d*) *Ibid.*

(*e*) Beveridge on the Bill Chamber, p. 33, and Appendix, p. 44; Bell's Dict. *v.* Attestor, and authorities there cited.

(*f*) Balf. p. 117; Stair i. 6, 9; M'Ken. i. 7, 4; Spottiswoode, p. 345. *Leslie* v. *Leslie*, M. 16219 (1541); *Congleton* v. *Congleton*, M. 16222 (1550); *Stewart* v. *Dunkeld*, M. 16248 (1628); *Commissary of Dunkeld* v. *Abercromby* (1628), M. 16248; 12 and 13 Vict. c. 51, s. 26.

(*g*) Ersk. i. 7, 20, and case referred to. But see contrary doctrine in *Stewart*, *ibid.*; *Commissary of Dunkeld* v. *Abercromby*, M. 16248 (1628).

(*h*) Craig ii. 20, 7.

reception after a long delay (*a*). The cautioner should be a person having property within the jurisdiction of the Court of Session (*b*).

Oath of office not required.

The tutor-at-law does not make oath *de fideli* (*c*). On the service being retoured to Chancery, the retour is there recorded, and an extract given out, which forms the warrant for letters of tutory under the Quarter Seal. These are the tutor's title to act (*d*). The Director of Chancery, on issuing such letters of tutory, is required to transmit a certified copy thereof to the accountant, who, after making an entry thereof in his books, transmits the same to one of the principal clerks of Session in order of seniority and by rotation, thereby establishing a summary jurisdiction in regard to the estate in the Division to which such clerk belongs, to the same effect as if the tutor had been appointed factor by that Division (12 and 13 Vict. c. 51, sec. 28).

Advocation and reduction of service.

The proceedings may be brought before the Supreme Court, 1*st*, by advocation; 2*d*, by reduction. After the brieve is executed, though before the day of service, it is competent to carry the case by advocation to the Supreme Court (*e*). On the service being retoured, the proceeding is complete, the inferior judge is *functus*, and reduction is the only proper form of bringing the matter under review (*f*).

The form of procedure in advocations of service has been regulated by the statute 1 and 2 Vict. c. 86, s. 2. It was formerly the practice for the Supreme Court to remit the case back to the inferior court, with instructions (*g*); but that is no longer competent, as the statute requires the Lord Ordinary to advocate the brieve to himself, and to proceed therein by means of an

(*a*) *Irvine* v. *Elsick*, M. 16260 (1632); *A.* v. *B.*, M. 16261 (1632). But see *Riddell* v. *Riddell* (1669), M. 16281.

(*b*) *Hadden* v. *Barr*, 27 Feb. 1822; Bell's Prin. s. 2079.

(*c*) Correct Erak. i. 7, 7, and 1 Jurid. Styles 424, and 4th ed. vol. i. p. 306, by M'Ken. i. 7, 5, and Bankt. i. 7, 8.

(*d*) Erak. i. 7, 7; Balf. p. 114; 1 Jurid. Styles, p. 425; 3 Bell's Forms 242. *Liddel* v. *Ure*, M. 13965, Kilkerran's Report, and Elch. *v.* Tutor 20 (1748).

(*e*) *Jardine* v. *Currie*, 8 July 1825, 4 S. 158.

(*f*) Wal. p. 313. See opinions in *Jardine* v. *Currie*, 8 July 1825, 2 Ed. Shaw; *Miller* v. *Sawers*, 5 June 1841, F. C.

(*g*) *Jardine* v. *Currie*, 8 July 1825; *Cowan* v. *Wardrop*, M. 16249 (1628).

inquest (*a*). With regard to reductions of the verdict, it has been held, as to the service of an heir, that the Court may send the question to a second jury, or determine it themselves, if they think it more expedient (*b*); and the same rule would seem applicable to the case of tutory.

Provisions of Pupils' Protection Act applicable to tutors.

The provisions of the Pupils' Protection Act (12 and 13 Vict. c. 51) relating to judicial factors, and relating to the powers of the accountant, are made applicable to tutors-at-law and tutors-dative. These provisions will be considered afterwards in treating of factors *loco tutoris*.

SECTION V.

TUTORS-DATIVE.

By whom nominated.

If there be no tutors-testamentar or tutors-at-law, then tutors-dative may be appointed. This class of guardians has always been nominated by the Crown,—latterly through the medium of the Court of Exchequer, and now through the Court of Session, as now the Court of Exchequer (*c*).

The origin of such nominations may, it is said, be traced to the Roman law (*d*). Others, again, hold them to be the result of the feudal customs. But the reason why the Crown exercised this power through the Court of Exchequer, and not by means of the ordinary courts, is not so obvious. The practice is thought to have originated in the principles of the feudal law. The superior in early times being entitled to the custody of his ward during minority, received also as a recompense for his education and maintenance, and to meet the expense of the service of another vassal in the interim, the entire produce of the estate of his minor ward. This was the chief source of the Crown revenues under the *regime* of the feudal customs. The collection of this revenue, and its manage-

(*a*) *Tennant* v. *Pollok*, 20 Nov. 1841, 4 D. 50. See note of Lord Ordinary in this case. But see note to *Miller* v. *Sawers*, *supra*, 3 D. 998.

(*b*) *Matthew* v. *Wighton*, 23 Dec. 1843, 6 D. 305. Advocations and reductions of services of *heirs* are now regulated by the Act 10 and 11 Vict. c. 47, ss. 17, 18, 19.

(*c*) 19 and 20 Vict. c. 56, s. 19.

(*d*) Stair i. 6, 11; Ersk. i. 7, 8 and 9.

ment, pertained to the Treasurer of Scotland, and afterwards to the Court of Exchequer; and thus it was only natural that the same officers should have the power or burden of attending to the custody of the child and the administration of his estate (*a*).

Time of appointment.

In order to afford time to the nearest agnate to serve tutor-at-law, no tutor-dative can be appointed, if the agnate object, until the expiry of a year and a day from the period when the latter might serve tutor-at-law. But if given within the year, the nomination will be effectual, if the tutor-at-law do not serve in due time (*b*). Where the tutor-at-law renounces, a tutor-dative may be appointed within a year after the father's death, or the failure of testamentary tutors (*c*).

Who may be appointed.

It is competent to the Court to appoint any persons they please to the office of tutor-dative, under the qualifications already explained (*d*). They usually prefer those for whom the father or other relations have shown a predilection. Such are testamentary tutors, whose nomination has fallen by the failure of a quorum or *sine quo non* (*e*). If the tutor-at-law declines to serve, but expresses his willingness to act as tutor-dative, he may be so appointed (*f*).

How appointed.

It was anciently the custom to grant tutories-dative to the first person who applied for them, and hence parties unfit for the office frequently obtained it. To put a stop to this practice, the Legislature interposed, by requiring the consent of the pupils next of kin to every gift of tutory; or, at least, that due notice should be given them of the application to the Court (1672, c. 2) (*g*). Under the Court of Exchequer Act (19 and 20 Vict. c. 56, s. 19) the form of procedure is by summary petition in common form setting forth the nearest of kin of the pupils; and the petition is also intimated to the Crown, as it is part of the Crown's prerogative to make the appointment (*h*).

The tutor must find caution for his intromissions before exped-

(*a*) Bruce's Tutor's Guide, p. 102 *seq.*; *Melville* v. *Drummond*, M. 16256 (1631). For the old forms of brieve, see Dallas, vol. i. pp. 98 and 210. See also Jurid. Styles, vol. i. 307, 4th ed.

(*b*) *Supra*, p. 185. But see *Ker* v. *Logie* (1665), M. 16271.

(*c*) *Martin*, 26 Nov. 1859, 22 D. 45; *Simpson*, 16 July 1861, 23 D. 1292; *Wilson*, 22 Jan. 1857, 19 D. 286. In this case clergymen were appointed tutors-dative.

(*d*) *Supra*, p. 169 *seq.*

(*e*) Stair i. 6, 11; Bankt. i. 7, 15.

(*f*) *Urquhart*, 2 March 1860, 22 D. 932; *Simpson*, *supra*.

(*g*) See the forms stated in 3 Bell's Styles 261 *seq.* Juridical Styles, 4th ed. vol. i. p. 389.

(*h*) *Wilson*, 22 Jan. 1857, 19 D. 286.

ing the tutory (*a*). When several tutors-dative are appointed by the same gift, it was formerly thought that they might be received as cautioners for each other (*b*). But a different rule is now applied in such cases (*c*). Regularly the tutor-dative should make oath *de fideli administratione officii* (*d*).

Forms of nomination.

The nomination of tutors-dative differs in one respect from that of tutors-nominate. Where two or more parties are appointed tutors-dative, without any declaration that they are appointed jointly, or as a quorum, or with a *sine quo non*, the law will hold the nomination joint; and, accordingly, on the death of one, the whole fails (*e*). This was decided by the House of Lords in *Scott* v. *Stewart* after a full examination into practice. The Lord Chancellor observed: 'I need hardly add, having stated it so repeatedly, that all reason is most clearly and decidedly against the doctrine that the office of tutor bestowed by the Court, exercising the royal functions in this respect, upon one individual, *propter dilectum personæ*, in conjunction with another, may be bestowed upon that other upon whom alone they never would have dreamt of bestowing it. They may appoint the mother from delicacy towards her, and from respect towards her feelings, or from a wish that she may interpose where it may be expedient for the benefit of the infant; and even if it is not from respect to her feelings, it may be with a view to that aid, nurture, and other maternal assistance which the child may derive the benefit of during the early stage of infancy; but with her there may be added another in the more manly office of tutor, which a man only can execute with success and with advantage. The mother may well continue to be the tutrix during the period of the child deriving that aid from her to which I have referred, and yet may ill continue to be the tutrix after others have been withdrawn by their decease or incapacity. The office of tutor is in its very nature joint, whether the words of junction be used or no; and the party deceased may be the very party upon whom

(*a*) The form of the bond is regulated by the Pupils' Protection Act, 12 and 13 Vict. c. 51, s. 26.

(*b*) Stair i. 6, 11; Ersk. i. 7, 9; 2 Jurid. Styles 84.

(*c*) *Grant*, petr., 26 May 1848, 10 D. 1052.

(*d*) Stair and Ersk. *ibid.*; Bankt. i. 7, 8; and M'Ken. i. 7, 5.

(*e*) *Stewart* v. *Baikie*, 28 Jan. 1829; *Stewart* v. *Scott*, 29 Feb. 1832, revd. 7 April 1834, 7 W. S. 211.

principally, in the vast proportion of cases, the Court devolved the exercise of those functions, and the party to which it looked, and not to the other. It is perfectly clear that there is a great difference between this case and that of tutors-testamentary.' In the case of tutors-testamentary the nomination subsists, although all but one should decline the office or die (*a*). Practically it is now usual, where more than one tutor-dative is appointed, to make the appointment in favour of them or the survivor of them (*b*).

SECTION VI.

ACCEPTANCE OF THE OFFICE, AND MAKING UP INVENTORIES.

Acceptance of the office.

I. Unlike the Roman law, it is entirely in the tutor's free will to accept or decline the office (*c*); but when he has once accepted, he cannot renounce it, without the authority of the Court, and the statement of a sufficient excuse (*d*).

Acceptance by tutors-testamentar.

(1.) The ordinary mode by which tutors-nominate declare their acceptance, is by indorsing a declaration to that effect on the deed by which they are appointed (*e*). It has been held that testamentary curators, who had signed by initials a minute of acceptance, but who had thereafter lain by for a number of years, were not to be considered as having accepted office in terms of the Act 1696, so as to render their consent essential to the validity of a deed executed by the minor. The Court were agreed that if the matter had stood upon the minute of acceptance alone, it was good, but that the whole subsequent conduct of the curators showed that it had not been dealt with as a binding acceptance, and therefore they did not sustain it. Lord Ivory observed: 'As to the acceptance of the office by curators testamentary, I am inclined to Erskine's doctrine, that they may accept without any forms of law, and that it is not necessary to go

(*a*) *Supra*, p. 176 *seq.*

(*b*) *Wilson*, 19 D. 286; *Martin*, 22 D. 45.

(*c*) Stair i. 6, 11; Bankt. i. 7, 16; Ersk. i. 7, 20; Dirl. *v.* Tutors, p. 443.

(*d*) See Vinnius Com. on Inst. tit. 25, opening passage as compared with *Munnoch*, 7 July 1837, 15 S. 1267; Bankt. i. 7, 16; Bruce, p. 279. See *infra*, *v.* Termination of Tutory, Div. iii., 12 & 13 Vict. c. 51, sec. 31.

(*e*) Ersk. i. 7, 20.

before the Judge Ordinary. If the matter had stood on the minute which is subscribed by initials, I should have been inclined to hold *that* an unqualified acceptance of the office of tutor and curator. But three years elapsed after that, and we must see what was done.' The Lord President observed: 'I think that these parties can scarcely be regarded as accepting curators; at first they declined either to accept or to refuse; after a time they intimated their intention of accepting.' 'They called a meeting, and at that meeting they announced their acceptance. Now, if the question had arisen after that, I could have had little doubt in interpreting that into an acceptance. But I am not satisfied that they considered that they had finally intimated their acceptance, because I must judge a good deal by their subsequent conduct. After the pupil became a minor, they took no step. The only step they took was to interpose by a compearance in the process of giving up inventories. They insisted that Mrs Bruce had become disqualified by her marriage, and that Jamieson was not qualified, and they intimated that they would not act along with him.' 'Is their subsequent conduct consistent with the notion that they held themselves to have accepted?' 'Therefore I am very much disposed to go along with the Lord Ordinary in the result he arrives at; I am not prepared to say that the actual appearance before the judge was necessary on the part of tutors-nominate to enable them to act' (*a*).

Implied acceptance of office.

Acceptance is *implied* in cases where the tutor performs such acts of administration as can be referable to no other authority (*b*). Such is the case when the party nominated tutor gives up inventories *habili modo* (*c*); or merely raises a summons for giving them up (*d*); or takes the oath *de fideli* (*e*); or signs deeds applicable to the pupil's estate, wherein he is designated tutor (*f*); or where (there being a number appointed) the recusant tutor attended meet-

(*a*) *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265.

(*b*) Stair i. 6, 6; Bankt. i. 7, 5.

(*c*) *Watson* v. *Watson*, M. 12767 and 3244 (1714). This case was afterwards appealed on another point. Robertson, p. 134.

(*d*) *Mollison* v. *Murray*, 19 Dec. 1833, 12 S. 237.

(*e*) *Kirkston* v. *Hunthill*, M. 16268 (1662); *Napier* v. *Wood* (1669), M. 16280.

(*f*) Ersk. i. 7, 20. *Seton* v. *Seton*, M. 2185 and 12767 (1668). Compare the two reports of this case by Stair and Gosford. *Cunningham*, M. 16305, 2 Sup. 66 (1684); *Murray* v. *Murray*, 1 Feb. 1832, 10 S. 276.

ings of the whole of them, and in receipts which he took, designated himself tutor, or authorized legal proceedings to be raised in his name *qua* tutor, or performed any other similar act of tutorial management (*a*).

On the other hand, if the alleged acts of management can be attributed to any other undoubted cause, such as friendship or humanity to unprotected children, the Court would be slow in holding the party so acting to have accepted the office and incurred all the liabilities of a tutor (*b*). But acts, to be held referable to such an origin, must be of a slight and trifling character, such as giving directions about repairing a fence, putting the pupil to school, and ordering his stay and maintenance there (*c*). When of a more weighty and important kind, they will be considered as the acts of a tutor, unless the person performing them can establish, that at the time when these acts were done he did not know of his nomination to the office, and consequently could only be liable as *negotiorum gestor* (*d*). Again, the agent for the pupils sometimes proceeds to use the tutors' names without authority, and as if they had accepted. In such a case, the tutors cannot of course be held bound (*e*).

Acceptance when party nominated both trustee and tutor.

It often happens that a party is appointed at the same time trustee or executor, and tutor; and without any specific declaration of his intention, has intromitted with the minor's effects. On afterwards neglecting the requisites of making up inventories incumbent on a tutor, and thereby incurring the penalties of the Act 1672, attempts have in several cases been made to get rid of these, by arguing that the intromission was only referable to the office of trustee or executor, which alone the nominees had intended to accept, and not of tutor, whose duties they never meant to discharge. This plea has, however, been repelled; and the rule declared to be, that a distinct record of the acceptance of the office of trustee or executor, and rejection of that of tutor, must be made,

(*a*) *Lockhart* v. *Ellies*, M. 16301 and 2183 (1682); *Cunningham*, *supra*; *Agnew* v. *Agnew*, M. 16310 (1687); *Mollison* v. *Murray*, 19 Dec. 1833, 12 S. 237; *Gordon or Moffat* v. *Wishart*, 31 Jan. 1834, 12 S. 369.

(*b*) Erak. i. 7, 20. *Beatson* v. *Beatson*, M. 16298, 3 Sup. 378 (1678).

(*c*) *Watson* v. *Watson*, Robertson, p. 134 (1715).

(*d*) *Beatson*, *supra*.

(*e*) *Baird* v. *Chalmers*, M. 16253 (1630), Durie's Report.

otherwise the party will be held to be tutor as well as trustee, and liable accordingly (*a*). 'The same deed which named them trustees also named them tutors. They accepted and acted under that deed. They did not limit their acceptance to the one character of trustee, and express their repudiation of the other character of tutor. They acted generally under the deed, and this in all the circumstances I hold to infer their acceptance generally of the deed. I consider, therefore, that they cannot now repudiate the character of tutors' (*b*). A clause is therefore sometimes inserted, declaring that the accepting of the office of trustee shall not imply that the party is also to accept of the office of tutor and curator (*c*). A missive letter, not holograph and without solemnities, consenting to lend the pupil's money, was regarded as no acceptance of the office (*d*).

Acceptance of office by tutors-at-law and dative.

(2.) There can be no doubt in any case as to the acceptance or non-acceptance by a tutor-at-law or tutor-dative, because they must, before they can be entitled in any manner to act, solicit the office, and sign deeds for this purpose, and thereby declare their acceptance (*e*). And although these parties are bound to find caution for their intromission, before they are recognised as vested in the office, yet the omission to do this ought not to put them in a better situation than if they had given obedience to the law; and they are therefore held bound, just as if no caution had been required to complete their right (*f*). But there are contradictory authorities upon this point (*g*).

Declinature to accept. Delay.

(3.) When a tutor has once declared that he will not accept the office, he cannot afterwards insist on taking it (*h*). But no length of delay merely will infer a renunciation of the office by a tutor-testamentar; and it will require very strong circumstances of a

(*a*) *Cuninghame*, def., M. 16305, 2 Sup. 66 (1684); *Kilpatrick* v. *Macalpine*, M. 16381 (1793); *Thomson* v. *Waddell*, 16 June 1812, F. C.; *Mollison* v. *Murray*, 19 Dec. 1833, 12 S. 237.

(*b*) *Per* Lord Glenlee in *Mollison* v. *Murray*.

(*c*) *Hunter* v. *Matthew*, 22 Feb. 1844, 16 Jur. 337. See the clause quoted in the Report.

(*d*) *Watson* v. *Watson*, *supra*.

(*e*) Stair i. 6, 6; Ersk. i. 7, 20. *Dicta* in *Mollison* v. *Murray*, 19 Dec. 1833.

(*f*) *Cass* v. *Ellies*, M. 3504 and 16285 (1671); Ersk. i. 7, 20; *supra*, p. 188 (*h*).

(*g*) *Dunkeld* v. *Abercromby*, M. 16248 (1628).

(*h*) Stair i. 6, 24; Bruce's Tutor's Guide, pp. 279, 280. *Campbell* v. *Campbell*, M. 16246 (1627). More's Notes, pp. xxxvi. xxxvii.

positive nature to create a presumption that such was his intention (*a*). Where a tutor delays the declaration of acceptance, an action may be raised to compel him to declare his intention; failing which, to be for ever barred from the office (*b*).

Making up of inventories.

II. Before a tutor can enter upon the duties of his office, he must make up an inventory of his ward's property. The necessity for this proceeding has been succinctly stated in the preamble to the statute by which it is regulated (1672, c. 2), and which was copied from the Roman law (*c*). These old forms are now, however, superseded as regards tutors-at-law and tutors-dative (*d*).

How inventories are made up.

By the Act 1672, c. 2, it is enacted, that no tutor or curator of any pupil, minor, idiot, or furious person, shall have authority to exercise the office, or to meddle with the writs and estate, until first an inventory be made up by him, with consent of the nearest of kin on the father's side, and the nearest of kin on the mother's side, *who shall be majors, and within the kingdom at the time.* The inventory is ordered to be subscribed by the tutors and curators, and the nearest of kin (*e*). Where the latter will not concur, the statute enacts, that the nearest of kin both on the father's and mother's side, *who are majors and within Scotland,* shall be cited, on a summons at the instance of the tutors, for decerning them to concur in making up the inventory (*f*). If they do not appear, the inventory will be made up at the sight of the Judge Ordinary himself; or he will appoint a delegate to discharge the duty. The inventory so made up, is declared to be as effectual as if the nearest of kin had appeared and concurred.

It will be observed that the statute merely says, that the nearest of kin shall be cited, without mentioning distinctly the number necessary; and practice has interpreted this to mean two on each side, according to the rule of law, '*pluralis electio duorum numero*

(*a*) *Ramsay* v. *Dalhousie*, M. 16313 (1688). See the case of *Bruce* v. *Hamilton*, *supra*, p. 193, as to the effect of delay in acting, as inferring a presumption that there never was acceptance.

(*b*) *Supra*, p. 182.

(*c*) Code v. 51, 13; Code v. 37, 24; 3 Warnkönig, p. 171; Domat's Civil Law, vol. i. p. 271. See App.

(*d*) 12 and 13 Vict. c. 51, secs. 26 and 30; *infra*, p. 203.

(*e*) See the forms in App., and in 3 Bell's Styles 285 *seq.*

(*f*) See App. and 3 Bell's Styles, p. 289; Frazer's Jud. Proceedings, p. 164.

contenta est' (*a*); but, at the same time, though only one on each side were cited, the proceeding would not be inept (*b*).

Procedure when there are no next of kin who can be cited.

When the next of kin are so situated that it would be difficult, from their being abroad, or impossible, from there being none, to give them notice of the proceeding, the modern practice is to get a dispensation from the Court of the enactment to cite the nearest of kin on the side so disqualified. The mode of getting this dispensation is by first raising the summons for citing the nearest of kin, and then, when it is depending, to present a printed (*c*) petition to the Court of Session, stating the circumstances, and praying for a warrant to the judge making up the inventory to dispense with the citation of the nearest of kin; and that inventories made up on citing the next of kin not disqualified, with their concurrence, or that of a delegate named by the Judge Ordinary, shall be as effectual as if the next of kin on both sides had concurred or had been cited (*d*). The Lord Ordinary cannot grant the prayer of such a petition (*e*), because it is an exercise of the *nobile officium* of the Court, and as such, from immemorial practice appropriate to the Inner House. It deserves consideration, however, whether, as such petitions are truly incidental to the process of making up inventories, it would not be advisable in any future legislation to declare it to be competent before the Lord Ordinary in whose roll the process of making up inventories depends.

The petition must in general be intimated on the wall; its prayer will not be granted *de plano* (*f*). Such prayer has been granted in accordance with the express provision of the statute, when the next of kin on either side were out of Scotland (*g*). Where

(*a*) Bankt. i. 7, 25; Ersk. i. 7, 21. *Wallace* v. *Kennedy*, M. 16290 (1674). M'Ken. Obs. on 1672, c. 2.

(*b*) See Sess Pap. in *Graham* v. *Hopeton*, M. 5599 (1798), where this point was determined and stated, M. 16385.

(*c*) Not written—*Duthie*, 6 Dec. 1854, 17 D. 143.

(*d*) See the advice given by the Court in *A.* v. *B.*, 11 June 1841, F. C. alone; *Cruickshank*, 11 Feb. 1819, F. C.; *Hobbs*, 29 June 1831, 9 S. 841, 3 Bell's Illus. p. 33; *Thomson*, 6 Dec. 1855, 18 D. 193.

(*e*) *De Maria* v. *De Maria*, 25 June 1831, 3 Jur. 536; *Thomson*, *supra*. It is still appropriate to the Inner House, and does not proceed before the Lord Ordinary, under 20 and 21 Vict. c. 56. *Countess of Morton*, 11 Jan. 1859, 21 D. 216; *Wilson* v. *Alexander*, *infra*.

(*f*) *Murdoch*, 21 May 1835, 7 Jur. 369; *Wilson* v. *Alexander*, 15 March 1859, 21 D. 736.

(*g*) *Fordyce*, 23 June 1836; *Cruickshank and Hobbs*, *supra*; *Shields*, 2 Feb. 1832, 10 S. 282; *Blantyre*, 23

the next of kin on the father's side were resident two in England and one in Paris, the Court ordered personal intimation to them of the petition, to dispense with their citation and concurrence, and thereafter granted the prayer of the application (*a*). Where the pupil or his father is illegitimate, the Court authorize the inventories to be made up at the sight of the nearest of kin on the mother's side only (*b*); and in some cases of bastards they have dispensed with citation to any party, and even without ordering intimation on the walls and in the minute book, as is the usual practice (*c*). Where one of the pupil's next of kin on the mother's side was the wife of a tutor, it was held unnecessary to cite her, though no other cognates were in Scotland (*d*). The mother is one of the next of kin on her side. When the tutor is himself one of the next of kin, the two after him are cited (*e*).

Practice of applying to Court to dispense with citation, erroneous.

A number of these decisions seem to have been altogether unnecessary, and proceed upon an erroneous apprehension of the statute. The Act enacts that no tutor or curator shall have power to exercise the office until an inventory be made up by them, 'with advice and consent of the nearest of kin on the father's side and the nearest of kin on the mother's side, *who shall be majors and within the kingdom for the time.*' Thus it is not absolutely the nearest of kin. It is only the nearest who have attained majority; and of these, the parties whose advice is wanted are those who may be within Scotland '*at the time.*' The subsequent clause relative to the citation of the parties, when they do not appear voluntarily and give their advice and consent, is in these terms: 'And in case the nearest of kin on both sides will not concur in making up the inventar in manner foresaid, the saids tutors and curators shall raise summonds at their instance before the saids judges ordnar respective, for summonding the nearest of kin *that are majors and within the countrey upon either side,*' etc.

June 1832, 10 S. 702; *Spottiswoode*, 13 June 1833, 5 Jur. 426.

(*a*) *Thomson*, 6 Dec. 1855, 18 D. 193.

(*b*) *Stuart and Others*, 11 March 1837, F. C.; *Wood*, 21 May 1834, 12 S. 663; *Auchencloss*, 24 Feb. 1831, 9 S. 380; *A. B.*, petr., 23 June 1838, 16 S. 1209; *Wilson* v. *Alexander*, 15 March 1859, 21 D. 736; *Kyle*, 15 June 1861, 23 D. 1104.

(*c*) *Fiddes*, 13 Feb. 1839, 11 Jur. 333. See *contra*, *Wilson* v. *Alexander*, *supra*.

(*d*) *Blantyre*, 23 June 1832, 10 S. 702.

(*e*) Ersk. i. 7, 21; *Guthrie* v. *Edgartoun*, M. 16319 (1701).

Thus, then, if the nearest of kin that are majors are out of Scotland, then the next after them, who are majors and within Scotland, must be cited. And when the nearest of kin within Scotland are minors, the next in order after them must be cited.

Such being the plain enactment, it is difficult to understand how the practice has grown, of making applications to the Court to dispense with the citation altogether, when the nearest of kin are out of Scotland, although there may be kindred of full age still left to the minor, and resident in Scotland. There are very few cases, indeed, where such applications are at all necessary. They may be so in the case where the minor or his father or mother is illegitimate. But there are few cases (untainted by illegitimacy) where a minor has not kindred in Scotland; and if he has, they must be cited; and no decree of the Court can dispense with the Act of Parliament. Till this matter is settled by decision, the practical course to be followed (in consequence of the erroneous practice) is to present the usual petition to the Court, setting forth the fact that the nearest of kin are out of Scotland or are minors; that there are kindred after them in Scotland of full age, and praying for dispensation with citation, of those out of Scotland or in minority. A refusal of the petition is all that the petitioner can desire.

What Court competent to authenticate inventories. Form of.

The summons for citing the next of kin is competent either in the Supreme or Sheriff Court (*a*). When the next of kin not concurring reside without the Sheriff's jurisdiction, they cannot be cited without letters of supplement (*b*). The inventory must be probative (*c*). It is subscribed by the tutors, and the concurring

(*a*) 2 Jurid. Styles, p. 518; Act 1672, c. 2; cases cited *supra*.

(*b*) See App., and for form of summons in the Court of Session see 3 Jurid. Styles, p. 270; in Sheriff Court, Frazer's Judicial Proceedings, p. 164; Bell's Forms of Deeds, vol. iii. p. 286; Letters of Supplement in Bell's Styles, vol. iii. p. 271. In *Kyle*, *supra*, the Court of Session, after edictal citation of the bastard's next of kin on the mother's side, who were all stated to be resident in England, granted warrant in terms of the prayer of the petition, 'authorizing the judge ordinary of the bounds, in respect of the circumstances of the case, to proceed to the appointment of curators to the petitioner, on the citation of all having interest edictally, as use is; and to make up and complete the curatorial inventories at the sight of a delegate appointed by the said judge ordinary, and dispensing with the citation of the next of kin by the father's and mother's side.'

(*c*) So decided by the House of Lords, *Watson* v. *Watson*, Robertson's Appeals, p. 134 (1715). See App., and the form, 3 Bell's Styles, p. 291, and 2 Jurid. Styles 518.

nearest of kin; whom failing, the Sheriff or his delegate. The whole procedure in preparing it, and the solemnities of its execution, must be in strict consonance with the provisions of the statute, to be immediately detailed; otherwise it will not be sufficient even to free the tutor from the statutory penalties (*a*), though, if *ex facie* formal, it will be sustained as a sufficient title to compel a debtor of the pupil to pay (*b*). An inventory given up to the commissary for the purpose of obtaining a confirmation of the deceased's testament, will not supply the place of the statutory inventory (*c*). This was also held as to an inventory not made up before a judge, but privately at the sight of the minor's friends (*d*); and the same decision was given as to an inventory framed by the tutors themselves, without citing the next of kin, and given up by them without any judicial act to the clerk of Court (*e*).

Three duplicates of the inventories must be made out, whether the next of kin consent or not. These are all signed in the manner just stated. They are produced to the Sheriff or other judge before whom the proceeding has been carried through, and he pronounces an interlocutor receiving them, and ordaining them to be recorded in the court books. The clerk then signs them, and indorses on them a certificate of their having been produced, and that an act was made on their production (*f*). One duplicate is, according to the statute, delivered to the tutor; another to the next of kin on the father's side; and the last to the next of kin on the mother's. When the next of kin have not concurred, one duplicate is given to the tutor, and the remaining two are kept by the clerk, sealed up, to be delivered to the next of kin, should they afterwards apply for them.

Eiks to the inventory.

If, after the inventories have been made up, any other property belonging to the minor shall come to the knowledge or into the possession of the tutor, it is enacted that they 'also eik as things

(*a*) *Bruce* v. *Forsyth*, M. 16327 (1709); More's Notes, p. xli.; *Lothian* v. *Somerville*, M. 16337 (1724).

(*b*) *Guthrie* v. *Edgartoun*, M. 16319 (1701). But see Wall. Prin. p. 321, footnote.

(*c*) *Mittray* v. *Gordon*, M. 16310 (1686).

(*d*) *Yeaman* v. *Grieves*, M. 16323 (1707); *Bruce* v. *Forsyth*, M. 16327 (1709); *M'Turk* or *Rutherford* v. *Greig*, 1 July 1830, F. C., 8 S. 995.

(*e*) *Lothian* v. *Somerville*, 16337 (1724); *Thomson* v. *Waddell*, 16 June 1812, F. C.

(*f*) 2 Jurid. Styles, p. 519.

come to their knowledge, and within *two* months after attaining the possession.' Erskine says (*a*) that this is done by 'observing the same forms that are prescribed in relation to that first inventory;' implying that all the forms of citation shall be gone through which are necessary to the principal inventory. The statute, however, only requires that 'an act be made thereon,' and that there shall be left 'two duplicates in the clerk's hands, where the principal inventory was made;' and it is not usual in practice to adopt the forms of concurrence by the next of kin, or of summoning them to concur, when giving up the eik to the inventory (*b*). The doctrine of Erskine can only be meant to apply to the forms *in the Court* (*c*).

What the inventory contains.

The inventory must contain a description of the whole heritable and moveable estate of the pupils. The heritable estate will be described as in the titles, and the deeds containing the description will be referred to. The moveable estate will likewise be particularly detailed. The words of the statute are: 'Which inventar shall contain the names and designations of the lands belonging to the pupils, etc., and the bonds, counts, and tickets due to them, and sums therein contained, and their moveables, as well heirship moveables as other moveables' (*d*). The inventory must be prepared in all cases, even although the minor had no other property but one article or subject, and which therefore, being an *unum quid*, might be thought sufficiently known to the pupil or his friends (*e*). In the *Annandale* case the question occurred with reference to a large landed estate, asserted to be the sole property of the ward. There was, however, no decision on the point (*f*).

Who must make up inventories.

Tutors-testamentar, although they are not obliged to find caution like tutors-at-law and tutors-dative, are bound to observe the enactment of the statute by making up tutorial and curatorial inventories. Nay, the father could not exempt them from this obligation, though he may dispense with liability for omissions (*g*).

(*a*) Erak. i. 7, 21.

(*b*) 2 Jurid. Styles, p. 521.

(*c*) See the form of the Eik, 2 Jurid. Styles, p. 522, and Frazer's Judicial Proceedings, p. 170, and App. to this work.

(*d*) Act 1672, c. 2.

(*e*) *Burnet* v. *Johnston*, M. 16307 (1685).

(*f*) Sess. Papers in *Graham* v. *Hopeton*, M. 5599 (1798). These papers contain an ample discussion of the whole law and practice on this subject, by very able lawyers. They will be found in a separate volume in Hermand's Collection, Advocates' Library.

(*g*) Bankt. i. 7, 23, and case referred to by him; Bell's Prin. 2081; Act

It has been already seen (*a*), that a father is alone entitled to name tutors and curators, and that if any other person assumes this power, the individuals whom he nominates seem in truth only to be trustees for managing the particular property he has left the children. On this ground it was thought that the statute requiring inventories to be made could not be applied to such trustees; but the Court have twice decided otherwise (*b*). The soundness of this doctrine has, however, been doubted (*c*). Fathers are not bound to make up inventories (*d*).

Tutors-at-law and dative not now required to make up inventories. Must produce a rental and accounts.

Until the passing of the Pupils' Protection Act, tutors-at-law and tutors-dative were bound to comply with the enactments of the statute 1672. But they are now relieved from that duty, and instead thereof must, as soon as may be after extracting their appointment, and within six months at latest from the date on which their bond of caution shall have been received, lodge with the accountant a distinct rental of all lands committed to their management, specifying the rents, revenues, and profits of such lands, the existing leases and other rights affecting the lands, and the public burdens, and other burdens thereon; and a list of all monies and funds belonging and debts due to the estate, specifying the particulars of each item, and the interest or revenue arising from the same, the document by which the same is vouched, and the nature and value of any security held for the same; and also an inventory of any household furniture, farm stocking, goods, or moveables, including rights moveable forming part of the estate. They are further required, without delay after extracting their appointment, to recover all writs and documents of importance belonging to the estate, and to collect all monies due to the same not securely invested, and to use all reasonable diligence in ascertaining the exact nature and amount of the estate placed under their charge. They are required to produce all such writs and documents and information so obtained by them, along with the said rental, list of funds, and inventory, to the accountant, which

1696, c. 8, last clause of it; *Lothian* v. *Somerville*, M. 16337 (1724); Wall. Prin. p. 321.

(*a*) *Supra*, p. 174.

(*b*) *Hamilton* v. *Hawkins*, 10 March 1790, Hume's Sess. Papers, vol. titled 'Winter 1789–90,' No. 118, with MS. notes, and quoted in *Kilpatrick* v. *M'Alpine*, M. 16381 (1793), where the same point was decided.

(*c*) *Supra*, p. 175.

(*d*) *Supra*, p. 164.

rental, list, and inventory, when adjusted and approved of by the accountant, are to be signed by him and the tutor, and to form a ground of charge against the tutor. It is provided, that if at any time thereafter any new claims or property belonging to the estate shall be discovered, the tutor shall report the same in his next account of charge and discharge to the accountant, who shall make such alteration on the rental, list, and inventory as may be thereby rendered necessary. It is specially provided that the rental, list, and inventory lodged with the accountant by the tutor as aforesaid shall be held as equivalent to the tutorial or curatorial inventory directed to be given up by the statute 1672, and the report of any additional funds or property belonging to the pupil shall be held as equivalent to an eik to a tutorial inventory in terms of said statute (*a*).

Effect of making up the inventory.

The judicial extract of the inventory forms the title of the tutor to administer his ward's affairs (1672, c. 2). But if payments be made to the tutor, who has neglected this duty, these will be sustained as effectual (*b*); and even in a question with creditors, the onerous transactions of guardians who have failed to make inventories will be upheld, because the privilege of inflicting the statutory penalty is personal to the minor (*c*). The inventory forms the rule of accounting between tutor and pupil; but it is provided by the statute, that the latter shall have liberty to plead that the tutor intromitted, or ought to have intromitted, with more of his effects than is therein contained (*d*). It was found in one case, that though the making up of the inventories had been neglected, a tutor was, in peculiar circumstances, entitled to pursue a reduction of a lease (*e*).

Penalties on failure to make up inventory.

When no inventory is made up, various penalties are imposed by the statute 1672, c. 2; the *first* of which is, that the debtors of

(*a*) 12 and 13 Vict. c. 51, secs. 3, 25, and 30.

(*b*) Bankt. i. 7, 24; Ersk. i. 7, 23.

(*c*) *Harkness* v. *Graham*, 28 June 1836, 14 S. 1015.

(*d*) Statute 1672, c. 2; Ersk. i. 7, 21. See also *Watherston* v. *her Tutors*, M. 16275 (1665). See *infra*, Part i. Div. iii. sec. ii.

(*e*) *Fraser* v. *Fraser*, 6 Feb. 1827, 5 S. 301. In the only report which exists of the case there is no argument from the bar, except a simple statement of the plea, that the tutor had no title to sue, because he had not observed the Act 1672, c. 2. The plea appears not to have attracted particular attention. See *Guthrie* v. *Edgartoun*, *supra*, p. 201. Wall. p. 321, footnote.

the pupils, minors, idiots, or furious persons, shall not be obliged to make payment to the tutors or curators of any sums due by them, unless the tutor or curator show that the sums demanded are contained in the inventories or eiks made up in terms of law. 2. The Act also declares that if the tutors and curators fail to make up the inventory, 'they shall be liable both for intromission and omission;' a punishment the meaning of which Erskine says he did not understand, seeing that by the common law tutors are liable for omissions. He thinks that it was perhaps meant, that the neglect to make inventories would subject the tutors in a liability for the slightest failure of their duty, or *ex culpa levissima*, to which tutors are not in the common case subjected; and that, without any fraudulent intentions in neglecting to prepare the inventory, they might be removed (*a*). Perhaps, however, a more probable meaning may be assigned to the statute, in holding it to apply to those cases where the father expressly exempts from responsibility for omission; for it has been held that the failure infers a forfeiture of such express exemption (*b*). Under the Pupils' Protection Act tutors-at-law and tutors-dative cannot enter upon the duties of their office until they have lodged the rental, list, and inventory, in terms of the statute. When lodged, these form a ground of charge against the tutor, and he must thereafter annually lodge an account of charge and discharge of his whole intromissions.

Extent of liability of tutor failing to make up inventory.

The nature of the omissions for which tutors have been made liable, consists of all neglect of duty producing loss. One of the conclusions of the summons against the tutors in one case was, that they ought to be decerned to make payment to the pursuer of the amount of the funds belonging to the defunct, as contained in an inventory made up by himself, with interest since his death, including all sums lost by bankruptcy or by neglect, omissions, or wrongous acts on the part of the tutors; and the Court found them liable in terms of this conclusion (*c*). So, in another case, a tutor

(*a*) Ersk. i. 7, 22; *Turnbull* v. *Bisset*, M. 16317 (1698).

(*b*) *Henderson* v. *Duff*, 1788, M. 16375, aff. 1793; *Kilpatrick* v. *M'Alpine*, M. 16381 (1793); *Hamilton* v. *Hawkins*, 7 March 1790, not reported, but quoted in *Kilpatrick*; *Murray* v. *Murray*, 1 Feb. 1832, 10 S. 276, and same case, 30 May 1833, 11 S. 663; *Mollison* v. *Murray*, 19 Dec. 1833, 12 S. 237.

(*c*) Sess. Papers in *Henderson* v. *Duff*, *supra*.

who had no direct intromissions with the minor's funds, was (having failed to make inventory) held liable for the contents of an heritable bond which was *ex facie* an inadequate security (*a*).

3. A father, by the Act 1696, is also entitled to declare, that each of a number of tutors shall only be liable for their own actual intromissions, and not *singuli in solidum*. The Act 1672 does not declare that, on failure to make inventories, the tutor shall also forfeit an exemption from joint liability, in like manner as he does an exemption from liability for omissions; and yet the Court have held, that although the Act did not so declare it, the tutors do forfeit such an exemption (*b*).

Not entitled to credit for expenses paid out for pupil.

4. They are not entitled to any 'allowance or defalcation of the charges and expenses wared out by them in the affairs of the said pupils, minors, idiots, or furious persons.' The Court have interpreted this clause by Act of Sederunt, which enacts that no expenses will be allowed, though necessary and profitable, expended in law-suits and legal diligences; but that all expenses incurred in regard to the entertainment of the minor, or expended upon his houses and estates, will be admitted. This Act of Sederunt seems to have followed the views expressed in a prior case (*c*). In accordance with its enactments, the expense of completing titles, *e.g.* serving the minor heir, or confirming the father's testament, will be allowed (*d*). So will payments of cess, teinds, and feu-

(*a*) *Murray* v. *Murray*, 30 May 1833, 11 S. 663.

(*b*) 'Lord Braxfield observed at moving, that tutors named under the Act 1696 were not entitled to plead the benefit of the Act, unless they complied with everything at common law, or by statute, incumbent upon them. The omission to make up an inventory, so material a duty, and so positively enjoined them, was a forfeiture of the benefit of the Act. Further, the statute 1672 expressly declares that failure to make up inventory shall subject to omissions. Now, this in fact renders each tutor liable *in solidum* for another. For if any one tutor intromit, 'tis the business of the rest to call him regularly to account of his intromissions. If he neglect, this is an omission which makes him liable *ex culpa*, which is the same thing as declaring each liable *in solidum*' (MS. note on Hume Sess. Papers, Adv. Lib., of *Henderson* v. *Duff*, 8 July 1788, vol. Summer 1788, No. 27). In accordance with these principles, the Court have in later cases held that tutors neglecting inventories were liable *singuli in solidum*, though it be expressly declared otherwise in the deed of nomination (*Kilpatrick* v. *M'Alpine*, *supra*; *Murray* v. *Murray*, 1 Feb. 1832; *Mollison* v. *Murray*, 19 Dec. 1833).

(*c*) *Burnet* v. *Johnston*, M. 16307 (1685); A. S. of date 25 Feb. 1693.

(*d*) *Yeaman* v. *Grieves*, M. 16323 (1707); Ersk. i. 7, 22; More's Notes, p. xli.

duty (*a*), and even expenses of law-suits in cases where the neglect of the tutors is not founded on *tempestive*, as inferring the penalties of the Act. But the case where this was settled was extremely special (*b*). On the other hand, incidental personal expenses incurred by the tutor in the management of the pupil's affairs will not be allowed (*c*). And where the expense of the maintenance and outfit of the minor has been taken from the capital of his stock, and not from the interest or annual produce, it was thought that such expense would not be allowed, if no inventories had been made up (*d*).

May be removed as suspect.

5. It is declared that they '*shall be removeable* from their office, as suspect tutors and curators, if they fail in making up the EIKS from time to time in manner foresaid.' Though this penalty is confined to the eiks, apparently *per incuriam*, of those who prepared the statute, yet it has always been applied to both the principal and the eiks, and has been often enforced by the Court of Session, who can alone do so (*e*). In discharging this duty, the Court have found, apparently in opposition to the language of the statute, and certainly in opposition to the Roman law (*f*) and to a prior decision (*g*), that after a tutor had intromitted, they had no discretionary power to remove him or not, according as he gave, or failed to give, a sufficient excuse for not making up the inventory; and this, too, although the removal might be prejudicial to the pupil himself (*h*). This doctrine, which may now be held settled (*i*), would not, however, be allowed to be carried to absurd consequences. If such

(*a*) *Bruce* v. *Forsyth*, M. 16327 and 3512 (1709).

(*b*) *M'Turk* v. *Greig*, 2 July 1830, 8 S. 995.

(*c*) *Bruce* v. *Forsyth*, *supra*. See also Bankt. i. 7, 24; *Kennedy* v. *Cumming*, M. 16309 (1686); *Parkhill* v. *Chalmers* (1771), M. 16365, House of Lords, 1772, 2 Pat. App. 291. See, as to advances made by the tutor's cautioner, *Irvine* v. *Spence*, M. 501 (1696).

(*d*) *Thomson* v. *Waddell*, 16 June 1812, F. C., as explained in Ivory's note 216 to Erskine i. 7, 22. See the case of factor *loco tutoris*, *Lambe* v. *Ritchie*, 14 and 22 Dec. 1837, 16 S. 219 and Jur.

(*e*) *Lothian* v. *Somerville*, M. 16337 (1724); *Burnet* v. *Johnston*, M. 16307 (1685); *Gibson* v. *Dunkeld*, M. 16299, 3 Sup. 364 (1680); *Brown* v. *Thomson*, 4 Sup. 72 (1692); *Turnbull* v. *Bisset*, M. 16317 (1698); *Austin* v. *Wallace*, 21 Dec. 1826; *Gibson* v. *Sharp*, 21 Dec. 1811, F. C.

(*f*) Dig. xxvi. 7, 7, Pr.

(*g*) *Mittray* v. *Gordon*, M. 16310 (1686).

(*h*) *Austin* v. *Wallace*, *supra*; *Gibson* v. *Sharp*, *supra*; *Gibson* v. *Dunkeld*, *supra*; *Turnbull* v. *Bisset*, *supra*; More's Notes, p. xli.

(*i*) But see More's Stair, p. xli.

a state of things should occur as to call for immediate and direct interference in the pupil's affairs, it seems contrary to reason to hold that if the tutor, while endeavouring to carry through the inventory, had in such a case interfered, the Court would remove him; and the Roman law (than which none could be stricter in these matters) expressly provided for such a case, by allowing the tutor to interfere (*a*).

After contradictory decisions (*b*), it was found that, as the statute specified no time within which the principal inventory must be made up (although it settles two months for preparing an eik), the Court were to judge of every case according to its circumstances, and to decide of the culpability of the tutor's delay by the difficulties he had to encounter (*c*).

6. With reference to any act done by the tutor prior to making up the inventory, Lord President Boyle held, in charging a jury, that the law will not presume fraud. It was, however, observed that the neglect might strengthen the proof, if there were, independently of it, substantial evidence in support of the charge of fraud (*d*). The doctrine thus laid down is contrary to the rule of the Roman law, 'Tutor qui repertorium non fecit, quod vulgo inventarium appellatur, dolo fecisse videtur' (*e*).

How amount of estate ascertained when inventories are not given up.

7. By the Roman law, if the tutor failed to make up the inventory, and consequently afforded no means of checking the amount of funds intromitted with by him, the pupil was allowed, on coming of age, to give his oath *in litem* as to the extent of the estate which the tutor had or might have intermeddled with (*f*). This is not the law of Scotland, because where statute has inflicted special penalties upon an offence, all others are understood to be excluded (*g*). All other ordinary evidence as to the amount of the funds may, however, be

(*a*) Dig. xxvi. 7, 7, Pr.; Vinnius Selectæ Quæstiones, lib. ii. cap. 16; Domat, Civil Law, by Strachan, vol. i. p. 271, No. 10; *Rob* v. *Rob*, 22 Dec. 1814, F. C.

(*b*) *Turnbull* v. *Bisset*, M. 16317 (1698); *Gibson* v. *Sharp*, 21 Dec. 1811, F. C.

(*c*) *Rob* v. *Rob*, 22 Dec. 1814, F. C., and see *Mittray*, *supra*; More's Notes, p. xli.

(*d*) *Morrison* v. *Morrison*, 20 Dec. 1841, Jury cause, 4 D. 337.

(*e*) Dig. xxvi. 7, 7, Pr., with Van Leuwin's note.

(*f*) Dig. xxvi. 7, 7, Pr.; Code v. 51, 13, 1.

(*g*) Bankton i. 7, 26; Ersk. i. 7, 22; *Parkhill* v. *Geddes* (1742), Elch. *v.* Tutor, No. 16, and notes; stated also by Bankt. *supra*.

adduced. Thus, where the tutor neglected to make up the inventory under the Act 1672, but confirmed the personal estate of the deceased, the inventory of such estate contained in the confirmed testament was held to form *pro tanto* a charge against him (*a*).

Privileges of decennial prescription not lost.

8. The neglect to make up inventories does not bar the tutor of the privilege of the decennial prescription of tutorial accounts introduced by the Act 1696, c. 9 (*b*); and if the minor, on reaching majority, settle accounts with his curators, he will not be entitled to challenge the settlement on the ground that inventories were not made up (*c*).

Not liable personally for debts.

9. In other cases, too, the Court have refused to impose new and additional penalties upon a tutor who may be guilty of this omission. They have held those of the statute sufficiently high. Intromission, therefore, by a tutor, before making up inventories, does not subject him personally to debts affecting the estate (*d*).

On whom are the penalties imposed.

The penalties imposed by the statute 1672 must be recovered from or imposed (or at least an action instituted for that purpose) upon the tutor during his life; for as all such claims are penal in their nature, they do not transmit against the tutor's heir, unless litiscontestation has taken place with the tutor himself (*e*). In one case, an opinion appears to have been indicated from the bench, that if there were a number of tutors, of whom some die and others survive, and if upon the surviving tutors the penalties of the Act be imposed, while the representatives of the deceased tutors escape, according to the rule of law just stated, the surviving tutors who have been thus subjected in penalties have a claim of relief against the representatives of the deceased tutors (*f*). The right to insist that the penalty be inflicted is personal to the minor, and cannot be insisted on by his creditor, whose patrimonial interest would be benefited by its infliction (*g*).

(*a*) *Napier* v. *Wood*, M. 16280 (1669); *Kirktons* v. *Hunthill*, M. 16268 (1662).

(*b*) *Gowans* v. *Oswald*, 16 Dec. 1831, 10 S. 144; *Mercer* v. *Irvine*, M. 10996 (1736).

(*c*) *Williamson* v. *Williamson*, 30 June 1815, F. C.

(*d*) *Wallace* v. *Anderson*, 21 Dec. 1826, 5 S. 179.

(*e*) *Graham* v. *Hopeton*, M. 5599 (1798); *M'Turk or Rutherford* v. *Greig*, 2 July 1830, 8 S. 995; *Mollison* v. *Murray*, 19 Dec. 1833, interlocutor of Inner House, 12 S. 241.

(*f*) *Murray* v. *Murray*, 1 Feb. 1832, 10 S. 276.

(*g*) *Harkness* v. *Graham*, 28 June 1836, 14 S. 1015.

DIVISION II.

TUTOR'S ADMINISTRATION.

CHAPTER I.

HOW THE TUTORS VOTE AND ACT WHEN THERE ARE MORE THAN ONE.

THE mode in which tutors give their consent to transactions in the management of the pupil's affairs, varies according to the nature of their appointment.

1. When there are a number of tutors, their actings are regulated by the following rules:—Where the nomination of a number of tutors is simple, it is not necessary that they all consent to every act of administration. What Lord Stair has stated with regard to the contract of mandate, seems applicable to this question of *administration*, and which is, that the majority of tutors nominated simply are entitled to perform all acts of *ordinary* management (*a*). Where there are only two tutors, both must concur in every act of administration (*b*); and a tutor dissenting from an act of administration carried by the vote of the others was once held not liable for the consequences of such act (*c*). But a tutor once accepting is bound

(*a*) Stair i. 12, 13; M'Ken. i. 7, 6; Ersk. i. 7, 15; *Scott* v. *Scott*, M. 16361 (1759). See the decisions on this subject relative to trustees, which seem to draw a distinction between acts of ordinary and extraordinary administration: *Frein* v. *Beveridge*, 28 June 1832, 10 S. 727; *Campbell* v. *M'Intyre*, 12 June 1824, 3 S. 126. See M'Laren on Trusts, i. pp. 234 *seq.*

(*b*) *Thorburn* v. *Rankine*, 25 Feb. 1832, 10 S. 380; Lord Corehouse's note in *Moffat* v. *Robertson*, 31 Jan. 1834, 12 S. 369.

(*c*) *Scotstarvet* v. *Buccleugh*, M. 16266 (1642), a special case in which the act of curatory expressly validated deeds done with the consent of any two of the curators named. See *dictum* of Lord Wood in *Logan* v.

to act along with the others, and to concur with them in all proper and necessary acts of administration (*a*). Although, in the case of a simple nomination, the vote of the majority will settle the matter, it does not follow that the minority will be debarred entirely and in all circumstances from carrying out their views (*b*).

Joint tutors.

2. All acts, whether ordinary or extraordinary, in the management of the ward's affairs, must, in the case of a *joint* nomination, be done with consent of the whole tutors, otherwise they are null (*c*).

Quorum.

3. A quorum differs from a joint nomination in this, that if the quorum consent to any ordinary act of management, the dissent of the remainder does not affect its validity; but to every act the whole quorum must consent, it not being enough that they were present at the meeting where the act was resolved on, if they disagree (*d*). And if the thing done require the continued existence of the quorum (such as a submission), it will be held to have fallen by the failure of any of the quorum (*e*).

Sine quo non.

4. The powers of parties appointed *sine quibus non* are of course modified according to the terms of the deed of nomination; for they may be nominated, on the one hand, as persons without whom the tutory will not subsist, or on the other hand as persons whose consent is requisite to every act of administration so long as they continue in office, but whose secession from it does not annul the nomination (*f*). Where there is no specialty in the deed of nomi-

Manson, 26 May 1843, 5 D. 1072, and *infra*, Div. ii. chap. iv.

(*a*) See *infra*, *v.* Termination of Tutory, Div. iii. sec. i. *v.* Resignation of Office.

(*b*) See these cases: *Davidson* v. *Mackenzie*, M. 14705; Hailes, p. 467 (1772); *Stark* v. *Stark*, Mor. 6291, 5 Sup. p. 745 (1746).

(*c*) Ersk. i. 7, 15; Stair i. 12, 13; *Scott* v. *Scott*, 1775, Hailes, p. 621, and other authorities just cited; *Vere* v. *Hyndford*, Bell's Reports, p. 554 (1791), overturning the doctrine of Lord Kames' Principles of Equity, B. iii. ch. vi. p. 286, where his Lordship draws some nice philological distinctions on the meaning of the word *concur*.

(*d*) Bankt. i. 7, 22; Bruce, Tutor's Guide, p. 52; Ersk. i. 7, 15, and i. 7, 30. *Vere* v. *Hyndford*, M. 16378, and Bell's Rep. p. 554 (1791). See a discussion as to the powers of a quorum of trustees, *Halley* v. *Gowans*, 20 Feb. 1840, 2 D. 623.

(*e*) *Maitland* v. *Mitchel*, M. 641 (1796).

(*f*) *Drummore* v. *Somerville* (1742), M. 16347. In this case there was a special provision, that if the *sine quo non* should not accept, the nomination of tutors should still hold good; and it was ruled accordingly. See Kilkerran's account of this case, M. 14703. In ordinary circumstances, the failure of a *sine quo non* would vacate the appointment: Bell's Prin. s. 2074;

nation, their powers are entirely of a negative character, and no positive act of management which an ordinary tutor could not do can be performed by them. They are designed to form a check upon the rest, and consequently are not bound to assign a reason for refusing to concur with the other tutors in any act. And if they so refuse, the others, though a majority, cannot do the act alone (*a*). After a *sine quo non* has accepted, the nature of his duties cannot be changed even by himself, however inconvenient they may be to all parties; and so he cannot resign his office of *sine quo non*, and exercise only the rights of an ordinary tutor. He must appear at every meeting, and consent to every act of administration (*b*).

Montrose v. *his Tutors* (1688), M. 14697; *Aikenhead* v. *Durham* (1703), M. 14701; *Donaldson* v. *Donaldson* (1770), M. 16364; *Scott* v. *Scott* (1775), Hailes 621, M. 16371, and 5 Sup. 633; *Sinclair* v. *Sutherland*, 1777, Hailes 752, 5 Sup. 634. The nomination in the two last cases was, however, sustained; because, on the construction of the trust deed, the Court were of opinion that the testator desired the tutory to subsist, even though the *sine quo non* failed.

(*a*) *Vere* v. *Hyndford*, M. 16378, Bell's Rep. 554 (1791); Ersk. i. 7, 30. See also Bankt. i. 7, 22; M'Ken. i. 7, 6; *Aikenhead* v. *Durham*, M. 14701 (1703).

(*b*) *Vere* v. *Hyndford*, M. 16378, and Bell's Rep. 554 (1791).

CHAPTER II.

TUTOR'S POWERS IN REGARD TO THE PERSON, EDUCATION, AND ALIMENT OF THE PUPIL.

Custody of the pupil.

I. As the father of a child is his natural guardian, the law grants him the custody of the child during his (the father's) life (*a*), and on his death endeavours to give it to his nominee.

Custody given to father's nominee.

(1.) Should the father, therefore, have appointed in his testament that the child shall be placed with any one, this nominee will be preferred to the custody over any other claimant, even the mother, unless the child be in infancy (*b*).

Failing the father's appointment, the mother is entitled to the custody.

(2.) Even in the period when the rules applicable to ward-holding were most strictly administered, and when the superior had the custody of his minor vassals, the mother was allowed in all cases to retain the custody of her child until he arrived at seven years of age (*c*). This rule is followed at the present day; so that testamentary tutors cannot claim to have the custody of the child in preference to her (*d*). Effect was given to this rule even in a case where the mother had lived separate from her husband for years, and had only been allowed a very restricted access to the children at intervals; the husband having, moreover, specially nominated tutors to them. The Lord President observed: 'As no personal

(*a*) *Supra*, p. 67 seq.

(*b*) *A.* v. *B.*, M. 16224 (1553); Craig ii. 20, 6 *ad fin.;* Wallace, Prin. p. 322; Bruce's Tutor's Guide, p. 135; *Forbes* v. *Caithness*, M. 16241 (1613); *Scott* v. *Scott* (1759), M. 16361, and 5 Sup. 872; *per* Lord President in *Borthwick* v. *Dundas*, 20 Dec. 1845, 8 D. 318; but see doubts by other judges in that case.

(*c*) *Foreman* v. *Oliphant* (1527), and other cases in Morrison, 16216; Balf. p. 336; Craig ii. 20, 11; Bruce's Tutor's Guide, p. 146. See also *Scott* v. *Scott*, 5 Sup. 872.

(*d*) Ersk. i. 7, 7; Bell's Prin. sec. 2083; *Campbell* v. *Campbell*, 7 March 1833, 11 S. 544. See a contrary opinion of Mr Brodie, note to Stair, vol. i. p. 53, *f.*

ground of objection or disqualification is stated against the petitioner, we must decide upon her application in this petition according to what are the rules of law and the due exercise of the superintending control of this Court. Had the case been different, and clear evidence been afforded of the late Mr Borthwick's determination and directions, that the custody of his children should not be committed to the petitioner by their tutors, I should have held that effect must be given to his resolution. But as the case stands, looking to the authorities and cases referred to, it appears that where the mother remains a widow, and there are no special grounds of exception, as occurred in some of the old cases referred to, and where there is no express provision by the father to the contrary, a mother is entitled to the custody of children under seven years of age, while the sole direction of their education remains with the tutors nominated by the father.' Lord Mackenzie observed: 'I think the general rule which has been laid down is, that after the father's death the mother is the natural guardian of the children up to a certain age. This has been established for two reasons,—1*st*, For the sake of the children, the mother having stronger affection for them than any one else can have; and 2*d*, For the sake of the mother herself, that she may satisfy her anxiety, and generate those filial affections in the children which absence is apt to prevent. I am not aware of any other age that has ever been named as the limit to this right on the part of the mother than seven' (*a*).

Mother deprived of custody for immoral conduct.

The rule is thus far modified, that if the mother be guilty of any improper conduct, by which the child may be polluted or debased, as by her fornication (*b*), and more especially by her having a bastard child (*c*), the Court will interfere, and will ordain the child, even within that age, to be taken from the mother, placed entirely out of her control, and given to the tutor, if he be not entitled next

(*a*) *Borthwick* v. *Dundas*, 20 Dec. 1845, 8 D. 318.

(*b*) *Kennedy* v. *Steele*, 16 Nov. 1841, 4 D. 12; Bruce's Tutor's Guide, p. 135; Bell's Prin. 2083; Dig. xxvii. 2, 5; Craig ii. 20, 14.

(*c*) *Walker* v. *Walker*, 10 March 1824, 2 S. 788; *Paul*, 8 March 1838, 16 S. 822; *Hogg* v. *Stoddart*, Hume, Dec. p. 889 (1805); *A. B.* v. *C. D.*, 13 June 1837, 9 Jur. 536. See also *Denny v. M'Nish*, *infra*, where the Court removed two pupil children from the custody of their mother, who had married again, on the ground of her improper and immoral character.

immediately to succeed to the child (*a*), or lodged with some unexceptionable person pointed out by him (*b*).

When the mother is deprived of the custody, or cannot claim it, tutors may interfere.

It sometimes happens that the tutor, not entitled to the custody of the children himself, appoints a person to keep them, who is not agreeable to the relatives of the pupils. In such a case, when the matter comes before the Court, they either nominate some third party to discharge the duty, or remit to the clerks of Court to report as to the respective qualifications of the persons suggested by the competing parties (*c*). Upon the whole, it may be laid down as a general rule, that the tutor's choice is preferable to that of the mother (in those cases where she cannot demand the custody herself) or other relations, provided he acts with integrity, intelligence, and sound discretion. The mother cannot claim an absolute right to the custody if she enter into a second marriage; and the pupil has often been ordered in such circumstances to be delivered to the tutor or the next cognate (*d*). But to this rule there is a clear exception, where a child's health is delicate, or where it is young, and so requires the fostering care of a mother; in which case, notwithstanding her second marriage, she will be allowed the custody of her child (*e*).

Where there is no tutor-nominate, and the tutor-at-law has not served, the Court will sustain an application relative to the custody of children at the instance of a factor *loco tutoris* with

(*a*) *Infra*, p. 219.

(*b*) Ersk. i. 7, 7, Ivory's note, 196. *Durie* v. *Durie*, M. 16277 (1666); *Walker* v. *Walker*, *ibid.*; *Paul*, *ibid.*, and other authorities, *infra*, p. 219 (*e*) and (*f*); *M'Leod* v. *Hill*, 26 Feb. 1833, 5 Jur. p. 271.

(*c*) *Ibid.* This was also done in the case of *Colebrooke*, 11 Feb. 1813, where the mother had been appointed sole tutor to the children, but had lost that right by a subsequent marriage in England. A competition arose between her and the children's paternal grandmother for the custody of them, when the Court saw cause to withdraw the children from both, and to place them at a boarding-school in Edinburgh, under the superintendence of a factor *loco tutoris*.

(*d*) 1 Domat's Civil Law, by Strachan, p. 270, No. 4; Code v. 49, 1; Craig ii. 20, 11; Stair i. 6, 15; Ersk. i. 7, 7; *supra*, p. 84. *Noble* v. *Noble*, M. 16248 and 407 (1627); *Langshaw* v. *Muir*, M. 16252 (1629); *Finnie* v. *Oliphant*, M. 16255 and 393 and 406 (1631); *Gordon* v. *Corsan*, M. 16259 (1632); *Fullerton* v. *Boyn*, M. 16291 (1675); *M'Ilvain* v. *M'Quirter*, M. 16340; Elch. *v.* Tutor 5, and notes (1736); *Anstruther* v. *Murray*, 4 Sup. 159 (1694); *Fisher* v. *Sarmon*, 21 Dec. 1827, 6 S. 270; *Paul*, 8 March 1838, 16 S. 824; statement in *Reoch* v. *Rob*, 14 Nov. 1817, F. C.

(*e*) Bruce's Tutor's Guide, p. 149; *Morton* v. *Thorburn*, 7 March 1835, 13 S. 640; *M'Callum* v. *Macdonald*, 10 March 1853, 15 D. 535. See *sup.* p. 84.

concurrence of the nearest relations. The children in one case were boys, aged respectively ten and nine; their mother had married again: she had, however, suddenly withdrawn with her children from her second husband's house, and instituted legal proceedings against him for separation and aliment, alleging that he had been guilty of various acts of cruelty, and had also contaminated her person by communicating to her the venereal disease. She subsequently, however, returned to the society of her husband, and disclaimed all the legal proceedings, alleging that she had given no direct authority to her agent to raise them. The Lord Justice-Clerk (Inglis), in delivering the opinion of the Court, observed: 'The proper question for the consideration of the Court in the special circumstances of this case is, whether it be more for the benefit of the pupils that they should be left in the custody of their mother, or removed therefrom.' 'It is now proved beyond the possibility of a doubt, that the whole of the proceedings were taken at her (the mother's) desire, and that the charges against her husband were in all particulars made under her direct instructions and authority. The result, therefore, of the inquiry which the Court ordered, is to show that she deliberately made charges against her husband of the most offensive and disgraceful description, which she now admits to be in all essential particulars unfounded; that she afterwards falsely denied that she had given any authority to her agent for stating these charges (thereby assailing the character and conduct of a respectable practitioner before this Court with a reckless disregard of consequences); and that she has now repeated on oath this false denial and slanderous accusation of her former law-agent. It is only necessary to add, that the respondents have been at pains to prove that the husband in 1861 cast on his wife the imputation of having communicated venereal disease to him, and subjected her to a medical examination, which proved the imputation to be unfounded; and that in the course of the judicial proceedings at her instance against him, he accused her of intemperate habits,—an accusation which he now withdraws, because, as he says, he believes it to be untrue; and he made it rashly, not from his own knowledge, but from the information of others. It is unnecessary to comment on these facts: they demonstrate only too plainly that the house of the mother and her husband is not a

fitting or safe home for children; and therefore the Court have no hesitation in making an order for the removal of the two children to whom this petition applies.' The Court accordingly ordained the respondents to deliver up to the petitioner the persons of the pupils, and subsequently approved of a scheme giving the custody of the pupils to their paternal uncle, and providing for their education at a public school named, it being explained that the scheme would be subject to alteration on cause shown (*a*).

Access by mother to child not in her custody.

Where, on account of any circumstance, the mother is deprived of the custody of her child, she is entitled at all proper seasons to have access to it when in the hands of tutors (*b*), or even of a father (*c*).

Removing child beyond jurisdiction of Court.

A child will be taken from its mother if she intimate an intention to withdraw it from the jurisdiction of the Court without a valid reason, or be guilty of other 'misconduct' (*d*); and a tutor unwarrantably taking the pupil out of the jurisdiction of the Court, will lose all right to direct its education; will be ordered to bring it back if he has carried it to England or elsewhere, and will be interdicted from removing it, if the act has not been already accomplished (*e*). Where, however, the Court is satisfied that the proposed removal of the pupil beyond the jurisdiction of the Court is not intended for any improper purpose, but is calculated in the circumstances of the case to be of advantage to the pupil, as for obtaining higher educational advantages, permission to remove the pupil will be given (*f*). In the case of natural children, tutors appointed by the father have no absolute right to the custody; but in one case they were found entitled to apply to the Court for the removal, for the purpose of education, of one, a girl nearly eleven years of age, from the custody of her mother, who was then married. Lord Glenlee observed: 'The petitioners have no right *de jure* to claim the custody of the child; but they are appointed by the trust

(*a*) *Denny* v. *M'Nish*, 16 Jan. 1863, 1 Macph. 268.

(*b*) *Logan* v. *Cathcart*, 14 Feb. 1827, 5 S. 341; *Borthwick* v. *Dundas*, 20 Dec. 1845, 8 D. 318; *M'Callum* v. *M'Donald*, *supra*, p. 215.

(*c*) *Supra*, p. 69.

(*d*) *Buchan* v. *Cardross*, 27 May 1842, 4 D. 1268; *Paul*, 8 March 1838, 16 S. 824. See the terms of the interlocutor in this case.

(*e*) *Reoch* v. *Rob*, *supra*, p. 215; *dictum* in *Campbell* v. *Campbell*, 7 March 1833, 11 S. 544, and *infra*, p. 222 (*a*).

(*f*) *Spiers*, 23 Dec. 1854, 17 D. 289; *Stuart*, 20 March 1861, 23 D. 779.

deed to disburse the funds left to their charge, and they cannot fulfil these instructions of the testator without the interference of the Court. They are therefore entitled to bring the matter before the Court, leaving it to them to exercise their jurisdiction in regulating the mode of education fittest for the child' (*a*).

Where the child is above seven years of age.

(3.) On the child's arrival at the age of seven, it was the old rule that the tutor was preferred to the custody, unless he was next in succession, or had otherwise disqualified himself (*b*). But the modern law allows the mother still to have the custody of her child, unless some cause is shown why the granting her this privilege would be disadvantageous to the pupil; such as (along with the other causes already mentioned), that the mother's manners and education are mean, while the child is heir to a patrimony justifying a liberal education,—a reason which would not be regarded as of much moment when the child was under seven (*c*); or where the mother, though herself of unblemished character, acts in such a manner as to prevent her child being instructed suitably to its rank and position in society. But, in general, the law endeavours to maintain an unbroken connection between parent and child; and though after seven years of age the right of the mother is not held so absolute as before that age (*d*), yet some valid reasons, such as those just indicated, must be assigned, ere the Court will order the child to be taken from her and given to the tutor's nominee (*e*).

It may, however, be doubted whether a mother, who is not in possession of the custody of her children, can enforce a claim to the custody of any above seven as against tutors. In a case where a mother petitioned for the custody of two children, the eldest of whom wanted but two months of being seven, the Court found 'the petitioner entitled to the custody of the younger child as prayed

(*a*) *Whitson* v. *Speid*, 28 May 1825, 4 S. 42. In a previous application the children had been left with the mother, as being the best course for the children in the then circumstances of the case: *Hunter's Trs.* v. *Speid*, 2 Dec. 1820, F. C.

(*b*) Ersk. i. 7, 7; Balf. p. 337; Bruce's Tutor's Guide, p. 149; *Dishington* v. *Hamilton* (1558), M. 16227, and other cases on same page of Morrison; Bell's Prin. 2083.

(*c*) See *supra*, *v.* Illegitimate Children, p. 130 (*e*). See also *Giffane* v. *Caldwallis* (1579), M. 1813.

(*d*) Stair i. 6, 15; Ersk. i. 7, 7; Bell's Prin. 2083.

(*e*) See these principles recognised in *Campbell* v. *Campbell*, 7 March 1833; Bruce's Tutor's Guide, p. 135; Code v. 49, 1; Novell 22, c. 38.

for, the tutors having the superintendence of his education;' but found 'it unnecessary to pronounce any deliverance as regards the elder child.' The Lord President (Boyle) observed: 'I am of opinion that, considering the very short period that will elapse till the eldest boy completes his seventh year, it would be inexpedient, and prejudicial to his education, which must have made some progress where he now is, to remove him from it; and therefore that our decerniture in favour of the petitioner should be limited to her having the custody of the younger child till it reaches seven years of age, when it must be handed over to the respondents to have its education completed' (*a*).

When the mother fails, the presumptive heir of the pupil is debarred from the custody.

(4.) When the mother is dead, or has become or rendered herself incapable, or after the pupil has arrived at the age of seven years, if a valid reason exists why the mother should no longer have the custody, a distinction must be made between the rights and privileges of the various kinds of tutors. In all cases, the law regards as the most improper custodier of the pupil's person the individual who is his heir, because his interests are adverse to the pupil's life (*b*); and while it looks upon him as the best administrator of the property, inasmuch as he would be presumed to manage well the estate to which he might one day succeed, it takes away from him the temptation which the possession of the pupil's person would give to accelerate his succession by sacrificing the pupil's life (*c*). To give such a tutor the pupil's person has been said '*agnum lupo committere ad devorandum*' (*d*), and the tutor will be debarred, even although he be heir only to a part of the pupil's estate (*e*). So, a tutor-testamentar was found not entitled to the custody, because he had purchased up from his brother, who was the pupil's heir, his *spes successionis* (*f*); but a lesser degree of interest would not be held as a disqualification, such as that the tutor is brother-in-law or

(*a*) *Borthwick* v. *Dundas*, *supra*, p. 214.

(*b*) Balfour reports a case where a contrary notion appears to have been sanctioned, thus showing that the principle in the text, though now an established rule of the law of Scotland, was yet not at all times recognised: *Davidson* v. *Studeman*, M. 16223, and Balf. p. 115 (1553).

(*c*) Stair i. 6, 15; Bankt. i. 7, 27 and 28; Ersk. i. 7, 7; Reg. Maj. ii. 47, 4; Balf. p. 337.

(*d*) Co. Litt. 1 Inst. 88, b.; Blackstone, B. i. c. 17.

(*e*) *Chalmers* v. *Gadgirth*, M. 16239 (1611).

(*f*) *Edgar* v. *Inglis*, M. 16237 (1606).

father-in-law to the pupil's heir (*a*). In short, where the tutor is the pupil's apparent heir, or has the same interest which the heir would have in the succession, the law will not (*b*), even though he be tutor-testamentar (*c*), give him the custody of the pupil. Failing the mother, therefore, the nearest cognate of the pupil will in these circumstances be preferred (*d*). In the case relative to the custody of the Marquis of Bute, where it was alleged that a lady, who was one of the English guardians appointed by the Court of Chancery, had clandestinely removed the pupil from England to Scotland, pending the settlement in the Court of Chancery of a scheme for his education, the Court of Session, on a petition at the instance of the other English guardian, who had subsequently been named sole guardian, appointed intimation to the tutor-at-law duly served and retoured in Scotland, there being large estates both in England and Scotland belonging to the pupil, and it being doubtful whether the pupil's domicile was Scotch or English; and then, upon a petition by the tutor-at-law, the Court sanctioned a scheme proposed by him for the residence and education of the pupil in Scotland (*e*). They subsequently, in terms of an arrangement made between the tutor-at-law and the English guardian, authorized the removal of the pupil to England for the purpose of his education, the English guardian coming under an agreement to restore the pupil to Scotland at the age of fourteen, with a view to his choosing curators (*f*). On appeal, however, the interlocutors of the Court of Session were reversed, on the ground that it was the duty of the Court to consider what was best for the

(*a*) *Langshaw* v. *Muir*, M. 16252 (1629); *Gordon* v. *Corsan*, M. 16259 (1632); Stair i. 6, 15.

(*b*) *Gibson* v. *Dunnett*, 10 July 1824, 3 S. 249; *Higgins* v. *Boyd*, 7 June 1821, 1 S. 50; *Dury* v. *Dury*, M. 16277 (1666); Ersk. i. 7, 7.

(*c*) *Chalmers* v. *Gadgirth*, *supra*; *Edgar* v. *Inglis*, *supra*; *Taylor* v. *Forrester*, M. 16242 (1622). See *M'Ilvain* v. *M'Quirter*, M. 16340; Elch. *v.* Tutor, No. 5, and his notes, where he condemns this case, seeing that the tutor, the next heir, received the custody (1736).

(*d*) *Higgins* v. *Boyd*, *supra*; *Gibson* v. *Dunnett*, *supra*. In *Walker* v. *Walker*, 10 March 1824, 2 S. 788, the Court preferred the tutor-at-law to the nearest cognate, holding that, though not entitled to the actual custody, he was entitled to fix the place of residence of the pupil, if no valid objection could be stated to it. See *supra*, as to the meaning of cognate and agnate, p. 183.

(*e*) *Stuart*, 20 July 1860, 22 D. 1504; *Stuart* v. *Moore*, 23 Nov. 1860, 23 D. 55; and 7 Feb. 1861, 23 D. 446, particularly the terms of the interlocutor at p. 449.

(*f*) *Stuart*, 20 March 1861, 23 D. 779.

interests of the pupil, and that these interests required that the scheme proposed in the Court of Chancery for his education in England should be carried out (*a*).

Where tutor is not pupil's heir.

If not the pupil's heir, the tutor could, failing the mother in any mode, take the child into his own keeping, even though he were tutor-at-law or tutor-dative (*b*). Some writers lay down the rule, as if the tutor-at-law were for ever debarred from this privilege, and as if the objection of being nearest heir, when it did exist, applied to him alone (*c*), instead of being applicable, as it might be, to all kinds of tutors (*d*). If there exist other reasons equally powerful with this against allowing the tutor to possess the person of his ward, the Court will give effect to them; *e.g.*, if he be a man of loose and dissolute habits (*e*), or have shown enmity and an adverse interest to the pupil, by intenting against him a process of bastardy, or the like (*f*).

Factors *loco tutoris* have no right to custody.

(5.) A factor *loco tutoris* has no right to the custody of the child (*g*), though he may apply to the Court for its protection when necessary (*h*).

Remedy where the direction as to custody is violated.

Should the father nominate the custodier of the child, or the Court appoint one at the suit of a petitioner, and should such appointment be violated, the remedy is to apply by summary petition to the Court of Session for a warrant to apprehend the person so violating the order, and to carry back the child to its former residence; and if the tutor be the wrong-doer, he will be

(*a*) House of Lords, May 1861, 4 Macq. 1; Court of Session, 25 May 1861, 23 D. 902.

(*b*) Stair i. 6, 15; Ersk. i. 7, 7; *Smith* v. *Forrester*, quoted by Stair; Balf. p. 337; Bayne's Notes, p. 30; Bruce's Tutor's Guide, p. 148; Bell's Prin. sec. 2083; *Yester* v. *Herries*, M. 16237 (1594); *Noble* v. *Noble*, M. 16248 and 407 (1627); *Langshaw* v. *Muir*, M. 16252 (1629); *Finnie* v. *Oliphant*, M. 16255 and 393 and 406 (1631); *Campbell* v. *Chalmers*, M. 16263, and 1 Sup. 88 (1634); *Hogg* v. *Stoddart*, 6 July 1805, Hume, p. 889; *Dick* v. *Douglas*, 5 March 1797, not rep. See the clear explanation of the whole law in *Robertson* v. *Elphinston*, 28 May 1814, F. C., p. 631, by Lord Robertson.

(*c*) Ersk. i. 7, 7.

(*d*) *Taylor* v. *Forrester*, M. 16242 (1622); *Chalmers* v. *Gadgirth*, *supra*; Craig ii. 20, 14; Stair i. 6, 15.

(*e*) *Dishington* v. *Hamilton*, M. 16227 (1558).

(*f*) *Dishington* v. *Hamilton*, *ibid.* and 8913, Maitland's Report (1558); Balf. p. 337.

(*g*) *M'Leod* v. *Hill*, 26 Feb. 1833, Jurist, F. C.; *Robertson* v. *Elphinston*, 28 May 1814, F. C.

(*h*) *Paul*, 8 March 1838, 16 S. 822; *A. B.* v. *C. D.*, 13 June 1837, 9 Jur. 536; *Robertson*, *ibid.*; *Denny* v. *M'Nish*, *supra*, p. 217.

deprived of his office (*a*). More especially will this be the case if any party, whether the legal custodier or not, attempts to carry the child beyond the jurisdiction of the Court (*b*). A complaint to the Court, on account of the improper conduct of the custodier of the child, may be made at the instance of a tutor; and this is the most common case (*c*); at the instance of a grandfather (*d*), or any other relation (*e*), or even at the instance of a factor *loco tutoris* (*f*). The right to regulate the permanent custody of the children is competent only to the Court of Session (*g*); and in those cases where the Court is not sitting, it is competent to the Lord Ordinary on the Bills to exercise all the powers and prerogatives of the Court in this matter (*h*). But the temporary custody may be regulated by the Sheriff, so as at least to restore the possession till the permanent rights of parties be settled by the Supreme Court (*i*).

What Court determines as to custody.

Education of the pupil.

II. It is the duty and the right of the tutors to direct the education of their ward, which ought to be in accordance with his birth and fortune (*k*). While the law will, as much as is consistent with the pupil's advantage, endeavour to give the *custody* to the mother, the Court have often interfered at the instance of the tutors to direct that the child be placed at their disposal, in order to its proper education. They have held the tutor, though not entitled

(*a*) *Gordonston* v. *Gordon*, 4 Sup. 725 (1708); *M'Dowal*, M. 14968 (1741); *Paul*, 8 March 1838; *Buchan* v. *Cardross*, 27 May 1842, 4 D. 1268. See *dicta* in *Stuart*, 20 July 1860, 22 D. 1504.

(*b*) *Ibid.* and *supra*, p. 217, as in (*d*) and (*e*).

(*c*) *Buchan*, *ibid.*; *Fullarton* v. *Wilson*, 31 Jan. 1829, 7 S. 393.

(*d*) *Per* Lord Mackenzie in *Kennedy* v. *Steele*, 16 Nov. 1841; *Buchan*, *ibid.*

(*e*) *Dicta* in *Buchan*, *ibid.*, and *supra*, p. 81.

(*f*) *Paul*, *supra*; *A. B.* v. *C. D.*, 13 June 1837, 9 Jur. 536; *dicta* in *Robertson* v. *Elphinston*, 28 May 1814, F. C. p. 631; *Denny* v. *M'Nish*, *supra*.

(*g*) This seems to be assumed as law in *Buchan* v. *Cardross*, 27 May 1842, 4 D. 1268.

(*h*) *Buchan* v. *Cardross*, *ibid.*

(*i*) *Supra*, p. 81 (*c*); M'Glashan on Aliment 93; Frazer, Jud. Proceedings, p. 176. The point occurred in one case as to the custody of a child. The case was begun in the Sheriff Court, but was advocated. No appearance was made for the advocator, and the Lord Ordinary repelled the reasons of advocation, and remitted the case to the Sheriff. This judgment was reclaimed against, in so far as it found expenses due to the respondent against his wife the advocator, and all objection to the competency of the Sheriff's jurisdiction was expressly waived (*Lang* v. *Lang*, 30 June 1849, 11 D. 1217).

(*k*) Stair i. 6, 3; Bankt. i. 7, 28; Ersk. i. 7, 24, and i. 7, 7; Bell's Prin. s. 2083. Tutor non rebus duntaxat, sed etiam moribus pupilli præponatur. Dig. xxvi. 7, 12, 3; 1 Domat. p. 270, No. 2.

to the custody, entitled to direct and superintend the education. In several cases they have constituted themselves judges of the conflicting statements of parties, and decided for the mother or the tutor according as they preferred the mode of education which each proposed (*a*). Where the father has chalked out a course of education for the child, his injunctions must be obeyed, unless they are immoral or irreligious (*b*). If a boy be at school where he has been placed by his father, and it would not be for his interests to remove him, the Court would at the instance of the tutors prevent the mother from doing so (*c*). The Court have repeatedly sanctioned schemes proposed by tutors for the education of the pupil (*d*), one of the most recent of which was the case relative to the education of the Marquis of Bute, and in which the House of Lords approved of a scheme of education for educating the Marquis in England (*e*).

Aliment of the child, and expense of education.

III. According to certain old authorities, the tutor was in no case allowed to give more for maintenance and education than the annual profits of the pupil's patrimony, 'except in very singular cases' (*f*). It is obvious that this rule had no application to those cases where the annual profits are so small as to be inadequate for the purpose, looking at the rank and fortune of the pupil; and the tutor would be justified in making a large expenditure, if the rank of the ward rendered this advisable (*g*). He must, *ex necessitate*, in such circumstances encroach upon the capital (*h*), though, if the

(*a*) *Scott* v. *Scott*, M. 16361, 5 Sup. 872 (1759), compare the two reports; *Fisher* v. *Sarmon*, 21 Dec. 1827, 6 S. 270; *Campbell* v. *Campbell*, 7 March 1833, 11 S. 544; *Hodge* v. *Marshall*, 20 Jan. 1795, not reported. In *Borthwick* or *Dallas* v. *Dundas*, *supra*, the Court, while they gave the custody of one of the children to the mother, expressly found that the tutors were entitled to superintend and direct his education.

(*b*) Dig. xxvii. 2, 1; 1 Domat. Civil Law, p. 270, No. 7; *A.* v. *B.*, M. 16224 (1553); Wall. p. 324. The same rule holds in England. See the cases collected *supra*, pp. 78 and 81.

(*c*) *Borthwick* v. *Dundas*, 20 Dec. 1845, 8 D. 318.

(*d*) *Denny* v. *M'Nish*, *supra*, p. 217.

(*e*) *Stuart*, *supra*, p. 220.

(*f*) *Pearson* v. *Belshes*, M. 16296 (1678); *Sandilands* v. *Telfer*, M. 16300 (1684); *Harpers* v. *Hamilton*, M. 16262 *ad finem* (1633); *Duncanson* v. *Duncanson*, M. 16336 (1715). Ersk. i. 7, 24.

(*g*) Ersk. i. 7, 24; Dig. xxvi. 7, 12, 3; More's Notes, p. xxxviii.

(*h*) *Gordon* v. *His Majesty's Advocate*, M. 16356 (1755); *Blairs* v. *Mitchell*, M. 16388, last interlocutor (1802). Code v. 37, 22, and v. 37, 3; Dig. xxvii. 2, 3, 5; Dig. xxvii. 2, 4; Stair i. 6, 18. *Per* Lord Ordinary in *Lambe* v. *Ritchie*, 14 Dec. 1837, 16 S. 219, or 22 Dec. 1837, in Jurist. More's Notes, p. xxxviii.; Bell's Prin. 2084.

property were heritage, the tutor could not validly sell it, even for this purpose, without judicial authority (*a*).

Advances made by third parties for pupil's aliment and education.

A third party advancing money to the tutor to enable him to aliment and educate the pupil has a claim against the pupil's capital, in so far as the money lent was *utiliter impensum* for the pupil (*b*).

Applications to Court for instructions.

The safe course for any tutor would be to apply to the Court for authority, in case any doubt should exist as to the proper amount to be allowed the pupil; and in one case, on the precedent of the Roman law, they were unanimous 'in holding that the application to them was proper' (*c*), and this is confirmed by decisions as to factors *loco tutoris* (*d*). But in one case the Court refused to interfere, considering the matter as one of those things in regard to which the tutor is the proper judge, and about which he must exercise his own discretion (*e*). As regards tutors-at-law and tutors-dative, they must report the matter to the accountant of Court, and obtain his opinion upon it in writing; and such report and opinion shall be submitted by the tutor to the Lord Ordinary, who reports the matter to the Court by whom it will be decided (*f*).

Where the annual income of the pupil is considerable, the tutor is not justified in expending it all in his education and maintenance (*g*); nor will he be allowed to give more than what is suitable to the maintenance of the child himself, although this might be beneficial to the pupil's mother, and raise the scale of living of the rest of the family (*h*).

How far aliment and education can be taken out of capital.

In one case, where a tutor sought credit in his accounts for advances out of capital for the aliment and education of the pupil, this was refused, because he had not made up tutorial inventories in terms of the Act (*i*). Where the annual income was only £22, the Court sustained a finding in the Sheriff's judgment awarding

(*a*) Stair, *ibid.* *Dictum* in *Colt* v. *Colt*, M. App. *v.* Tutor 1 (1801). *Infra*, Part i. Div. ii. chap. iii. s. 5.

(*b*) *Blairs* v. *Mitchell*, *supra*.

(*c*) *Maxwell* v. *Maxwell*, M. 16352 (1747); Bruce's Tutor's Guide, p. 139.

(*d*) *Infra*, Part iv. chap. ii.

(*e*) *Wodrow*, 26 Feb. 1830, 8 S. 604.

(*f*) 12 and 13 Vict. c. 51, sec. 7.

(*g*) *Gracie* v. *Gracie*, 15 May 1805, not reported; *Harpers* v. *Hamilton*, *supra*.

(*h*) *Munnoch* v. *Munnoch*, 22 Dec. 1836, 15 S. 302. See also *Munnoch* v. *M'Ewan*, 10 Feb. 1842, 4 D. 662.

(*i*) *Thomson* v. *Waddel*, 16 June 1812, F. C.

£25, being the half of the sum claimed by the curatrix (*a*). In an early case, where the question was raised with trustees, the Court authorized advances for the education and aliment of the younger children to be made from the trust estate, reserving the question whether these should come out of the capital of the provisions payable to the children on majority, or should be charged against the heir (*b*). Marriage contract trustees were authorized to repay a mother, out of the capital of the trust estate, sums advanced by her for the education of the children, she being entitled to the liferent of the whole fund, and there being no provision for the children except the capital of the estate (*c*). In the same case the Court also authorized a payment out of the capital of the trust estate for the aliment and education of the children for one year, reserving to the petitioners to apply again at the end of a year. Where the sum vested in trustees was destined to the children surviving at the death of the survivor of the spouses, and where there was power given to either of the spouses to withdraw so much of the capital as might be considered reasonable for 'the purpose of apprenticing or placing such of the said children as are sons in any profession, business, or employment, or for his or their instruction therein, or otherwise for his or their benefit or advancement in the world,' and also to give a portion to a daughter on her marriage, the Court refused to interfere and authorize the trustees to make any advance for aliment and education. In reference to the above case of *Hamilton*, Lord Cowan observed: 'There the fee of the capital was vested in the children as a class at the date of the application. There also there was a direct conveyance to the children in fee *per capita*, though the fund could not be divided until after Mrs Hamilton's death. Whether we did not exceed our powers in that case, may be a question. I am of opinion that we did not. At all events, that case is no precedent for the present.' And the Lord Justice-Clerk observed: 'I cannot participate in the indications of doubt expressed by Lord Cowan as to the jurisdiction of the Court to grant, or the competency of granting,

(*a*) *Kennedy*, 28 June 1860, 22 D. 567.

(*b*) *Riddels* v. *Riddel*, 1802, M. App. Aliment 4.

(*c*) *Hamilton*, 20 July 1859, 21 D. 1379, and 23 May 1860, 22 D. 1095.

that application. I think the judgment was a fair exercise of the *nobile officium* of the Court' (*a*).

In accounting for expenditure on this ground, the tutor is not bound to show vouchers for every single item charged; it is enough if the general sum be fair and reasonable (*b*).

(*a*) *Mundell and Others*, 24 Jan. 1862, 24 D. 327.

(*b*) *Ritchie* v. *Ritchie* or *Lamb*, 24 June 1834, 12 S. 775; same case afterwards, 14 Dec. 1837, 16 S. 219, and in Jurist under date 22 Dec. 1837.

CHAPTER III.

TUTOR'S POWERS OVER ESTATE.

General extent of the tutorial authority.

I. THE office of tutory is strictly one of administration (*a*). With regard to property, its object is rather to preserve than to acquire; to keep the pupil's estate in the same condition as the tutor found it, so far as consistent with its nature, rather than to attempt by speculations to improve it, because it can never be improved without risk (*b*). In accordance with this view are the powers granted to the tutor; for while he has received the most ample administratorial authority, he is denied many of the powers of a proprietor, except in cases where an urgent necessity otherwise demands it. His duties are peculiar in another respect; they arise not from any contract between the tutor and the pupil, nor 'simply by the constitution of the law, but *quasi ex contractu*' (*c*). He appears as the representative of his ward; the maxim of law being, that the pupil has no person. The state and condition of pupillarity has been already considered, and the subject need not be resumed (*d*). But it may be allowed here to repeat, that though the tutor represents the pupil in all cases, where some act requires to be performed, such as signing deeds and making bargains, and which (the law as to this matter presumes) calls for a mature and experienced judgment, yet where no act is to be done, and where it is only necessary to remain passive, the pupil is then as if *sui juris*. Thus the proper mode of conveying a right in favour of a pupil, is by disponing it

(*a*) *Administratio* est solicitudo, cura, gestio, defensio; non autem *dominum* esse, multo minus perdere posse. Van Leuwin's note 50 to Dig. xxvi. 7, 1, and Code v. 37, 16; and authorities in next note.

(*b*) Stair i. 6, 3; Ersk. i. 7, 16; Bankt. i. 7, 27; M'Ken. i. 7, 18; 1 Bell's Com. 133.

(*c*) Stair i. 6, 4; 1 Domat, p. 265, s. 2.

(*d*) *Supra*, p. 145.

directly to himself, and not to the tutor for the pupil's behoof (*a*). But in all cases of active administration, the tutor has the power to perform the requisite acts, without the consent or concurrence of the pupil; and the tutor performs them, too, in his own name *qua* tutor (*b*).

Father's powers as administrator.

The powers of all tutors in the administration of the minor's estate are the same; and in particular, the father, as administrator-in-law, has no higher authority than ordinary tutors, if the property administered do not come from himself (*c*). He is distinguished from ordinary tutors thus far, that he is not liable for omissions as they are (*d*).

Powers of tutors-nominate;

of tutors-at-law.

With regard to tutors-nominate, their powers are regulated by the deed nominating them to the office (*e*). And when there is no special power given, they have no higher authority than tutors-at-law; and what this is, has been thus stated by Lord Stair: 'Tutors may only do necessary deeds for their pupils: either such as the pupil is obliged to do, as payment of his debts, which the tutor may do willingly, without compulsion of law; or otherwise deeds necessary for management of his estate, as setting of his lands, or labouring the same, uplifting his rents and annual rents, uplifting the sums that are not secured, carrying on any work which was left to the pupil, which cannot otherwise be disposed of' (*f*). These general principles have been recognised by statute, which authorizes the tutor to vote at meetings of companies, of the stock of which the pupil is a shareholder (*g*). The tutor, acting under a high responsibility, is entitled to conduct the administration, according to his own ideas of what the circumstances demand. If he keep within the ordinary powers of management and administration, and

(*a*) *Supra*, p. 150.

(*b*) *Supra, ibid.; Prior of St Andrews* v. *Kinnier*, M. 16225 (1555); *Kinghorn* v. *Strangfather*, M. 16256 and 8982 (1631); *Anonymous*, 2 Sup. 616 (1672).

(*c*) See illustrations in these cases: *Beg* v. *Beg*, M. 16273 (1665); *M'Kenzie* v. *Fairholm*, M. 16278 (1666); *Lands* v. *Douglas*, M. 16250, 1 Sup. 173 (1629); *Campbell* v. *Dougall*, M. 16279 (1667); *Boswell* v. ———, M. 16353 (1747); *Calder* v. *Dowie*, 11 Dec. 1811, F. C., affirmed on appeal; *Bontine* v. *Graham*, 20 Dec. 1838, 1 D. 286, and 15 Nov. 1839, 2 D. 27; Bayne's Notes, p. 35; Stair i. 5, 12; Ersk. i. 6, 55.

(*d*) Stair *ibid.*, Ersk. *ibid.*, and other authorities, *infra*, Part i. Div. i. chap. iv.

(*e*) Ersk. i. 7, 15; Bell's Prin. 2081.

(*f*) Stair i. 6, 18; 1 Domat, p. 266, No. 2.

(*g*) 8 and 9 Vict. c. 17, s. 82.

adopt a course of proceeding which may not be considered the best for the interest of the pupil, a court of law will not interfere with him, but will leave his improper conduct to be considered when the time of accounting arrives (*a*). This, of course, is under the limitation, that the act done is within the powers of a tutor; and also with this further restriction, that, in the case of fathers and testamentary tutors, who are not in general bound to find caution, the Court will compel them to do so, on a party having interest establishing a sufficient cause (*b*). Tutors-at-law and tutors-dative are now placed under the immediate control of the accountant of Court, to whom they are required to submit annual accounts of charge and discharge, and who is required to audit these accounts on the general principles of good ordinary management, for the real benefit of the estate, and of those interested therein (*c*).

Collecting rents and debts, and keeping property in repair.

II. It is the duty of the tutor to collect and ingather not only the regular annual revenues of the pupil, but also to recover any single debts that may be owing to his ward (*d*). For this purpose he may institute actions against recusant debtors, and use all the ordinary compulsitors of the law competent to creditors for enforcing payment (*e*). His discharge will be as effectual to the debtor, as if granted by a creditor of full age (*f*). He has the power to call up the pupil's money, even when secured over heritage; and the debtor would not be allowed to withhold payment, on the ground that the necessities of the pupil did not require its being uplifted (*g*). In a question with the pupil, however, a different rule is applied; for if the latter can establish that the uplifting of the money was an unnecessary act, and that by its being uplifted he lost the benefit of a good security, then the tutor must

(*a*) *M'Feggan* v. *Murray*, Hume, p. 887 (1805), overruling *A.* v. *B.*, M. 16219 (1534); *Balfours* v. *Forrester*, M. 16320 (1705); *Salton* v. *Fraser*, 16 May 1720; Robertson's Appeals 312; Bankt. i. 7, 31.

(*b*) *Supra*, pp. 166 and 181; *Balfours* v. *Forrester*, *supra*.

(*c*) 12 and 13 Vict. c. 51, sec. 13.

(*d*) Stair i. 6, 19; Bankt. i. 7, 29; Ersk. i. 7, 16; Dig. xxvi. 7, 3, sec. 2; Dig. xxvi. 7, 15; Dig. xxvi. 46, sec. ult.; 12 and 13 Vict. c. 51, sec. 13.

(*e*) Ersk. i. 7, 16, and authorities as in last note. *Boswell* v. ———, M. 16353 (1747).

(*f*) Authorities *infra*.

(*g*) *Lyon* v. *Farquhar*, M. 16272 (1665); *Hill* v. *Maxwell*, M.16276 and 14355 (1665); *Graham* v. *March*, M. 16339, and Elch. *v.* Tutor 3 (1735); *Boswell*, *supra*.

make up to him the loss (*a*). Stair states the law thus: 'Tutors are not to exercise voluntary acts of dominion at their choice, as disposing of what is secure; but only necessary acts, for the preservation and recovery of what will or may perish, and for improving the profits of it' (*b*). With regard to ordinary personal debts, the case is different; for here the pupil has the worst security for his money, and it is the tutor's duty, therefore, to follow out all legal means for rendering these funds available. If, however, debtors be accounted responsible, the tutor is not bound to make up the loss, although they suddenly fail, before he has time to extricate his ward (*c*). On the other hand, if the debtors be known to be in declining circumstances, or if the tutor be guilty of great remissness in recovering the debt, even though the debtors were reputed solvent, he is liable in all the loss and damage which his neglect to proceed immediately against them may have occasioned (*d*).

A case relative to an executor may here be cited as in point. It was held that an executor was liable to account for the unrecovered balance due on a promissory-note payable one day after date, and granted to the deceased more than two years before his death, in respect he had failed to do diligence thereupon; notwithstanding that he discharged the duties of executor gratuitously—that he was himself interested in the estate to the extent of one-fourth—that he had obtained a payment to account and a collateral security (which, however, ultimately proved useless)—that he had kept up a constant correspondence with the debtor, demanding payment—and that he averred that he acted under the belief that a premature use of diligence would greatly injure the chance of recovery. Lord Fullerton observed: 'This is one of the hardest cases I ever met. The executor, on coming into office, found this bill as an investment which the deceased himself had entered into years before his death; and I think he was entitled to exercise some discretion as to continuing the investment or enforcing payment. It is true that he gave time to the debtors, but I am hardly

(*a*) Ersk. i. 7, 16, and other authorities *infra*, Part i. Div. ii. chap. iv. But see *Gib* v. *Gib*, M. 16363, 5 Sup. 632 (1769).

(*b*) Stair i. 6, 3.

(*c*) Bankt. i. 7, 29; *M'Murdoch* v. *Findlay*, M. 3509 (1699); *Watson* v. *Matheson*, M. 3501 (1623); *Gib*, *supra*.

(*d*) Ersk. i. 7, 24; *Watson* v. *Watson*, M. 16242 (1623); *Steven* v. *Boyd*, M. 3503 and 500 (1667).

satisfied that he did so entirely out of tenderness for them. I think he may have been in some degree influenced by the hope, that if he did not press too hard, there would be a better chance of recovering the debt. But executors must be taught that they are bound to exercise some diligence, and on that broad principle I think the safest course is to adhere' (*a*).

Diligence by tutor against debtors.

Against the heritage of the pupil's debtors, inhibition and adjudication must be led; against their moveables, poinding and arrestment and forthcoming (*b*); and if these fail, or if the debtor have no property, then recourse must be had to diligence against the person (*c*). But if they be in insolvent circumstances, he ought not to throw away the pupil's money in fruitless attempts to recover payment by means of diligence. The *onus*, it was found in old cases, lay upon the tutor to show that the debtor was in circumstances in which no legal compulsitors could have induced payment (*d*); and the Court rejected the general principle, that on the ground of mere dubiety a tutor is freed from trying the diligence of the law (*e*). The presumption was, that the debtors were at the commencement of the tutory solvent; and the tutor was exonered for not doing diligence only upon proof brought by him that they were insolvent at the commencement of the tutory, or became so within six months thereafter (*f*). The later practice, however, appears to have thrown the *onus* upon the objector (*g*). Where there is a competition between creditors of a debtor of the pupil, the tutor is liable in damages to his ward, if he allow the debtor's estate to be carried off by adjudication, without also adjudging for

(*a*) *Forman* v. *Burns*, 2 Feb. 1853, 15 D. 362. See also, as to the liability of trustees for profits made on unrealized trust funds, *Laird*, 26 June 1855, 17 D. 984.

(*b*) *Steven* v. *Boyd*, M. 16277 and 500, 2 Sup. 432 (1666).

(*c*) Ersk. i. 7, 24; *Steven* v. *Boyd*, *ibid.*

(*d*) *Tirias and Turpin* v. *Balbedy*, M. 16303 (1682); Bankt. i. 7, 37; Stair i. 6, 22; Ersk. i. 7, 24; *Steven* v. *Boyd*, *supra*; *Hamilton* v. *Hamilton*, M. 3502 (1628); *Irvine* v. *Spence*, M. 3509 and 501 (1696); *Watson* v. *Watson*, M. 16242 (1623); *Scrymgeour* v. *Wedderburn*, M. 16289 (1673); *Elder* v. *Elder*, 14 Nov. 1832, reported as a special case, 11 S. 9; but the interlocutor is given in the Session Papers.

(*e*) *Elphinston* v. *Milne*, M. 3511 (1702); More's Notes, p. xxxix.

(*f*) *Weir* v. *Hamiltons*, M. 16355 (1751).

(*g*) *Condie* v. *M'Donald*, 20 Nov. 1834, 13 S. 61; *Ritchie or Lambe* v. *Ritchie*, 14 Dec. 1837, 16 S. 219, or 22 Dec. 1837 in Jur.; and see *Cleland* v. *Brodie*, 13 Nov. 1844, 7 D. 147.

the pupil's debt, so as to come within year and day of the first effectual one. The rules as to diligence in recovering debts are modified in some measure by the nature of the debts to be recovered; for if they be small in amount, such as those of a retail shopkeeper, it would be a grievous hardship upon the tutor, and often prove prejudicial to the pupil, to insist upon exact diligence from the former in regard to each particular debt. As to these, the tutor would seem to be entitled to sell them in mass, provided the sale be made without collusion, and with due formality (*a*).

Payments to tutor.

Before the pupil's debtor can pay a tutor, he must satisfy himself of the latter's title; for if it be notorious that the tutor had disqualified himself, or is in suspicious circumstances, arising from any act after his appointment, payment made to him will not be sustained (*b*). Thus trustees who held funds for behoof of and payable to minors, were found personally liable for the loss, they having paid the funds to a *curator bonis* who was appointed on the application of the minor's relations, but who had not found caution, and so had not extracted his appointment, and who soon after left the country in a state of insolvency (*c*). But, on the other hand, if the payment be made in *bona fide* as to a father, or to one who is reputed to be the tutor, though his appointment may have been recalled, the payment will be sustained (*d*). If there be more tutors than one, payment of a debt can only be made to the whole of them, and not to one only, unless the deed of nomination so provide (*e*).

When pupil's capital is invested in trade.

It has been held that a factor *loco tutoris* ought not to leave the funds of the pupil in trade; and his liability to pay profits will be discussed before the question of fact as to the profits realized is determined (*f*). The withdrawal of the funds of an estate from the trade in which the tutor or curator found them embarked at

(*a*) Domat's Civil Law, vol. i. p. 273, Strachan's ed. No. 19; and see *Tirias* v. *Balbedy*, M. 16303 (1682).

(*b*) *Forbesses* v. *Forbes*, M. 16287 (1673); *Graham* v. *Duff*, M. 16383 (1794).

(*c*) *Donaldson* v. *Kennedy*, 18 June 1833, 11 S. 740.

(*d*) *Stevenson's Trustees* v. *Dumbreck*, 18 Feb. 1857, 19 D. 462; House of Lords, 11 Feb. 1861, 4 Macq. 86.

(*e*) Dirl. and Stew. pp. 443–4.

(*f*) *Guthrie*, 15 Dec. 1853, 16 D. 214. See *infra*, p. 236 *seq.*

the time of entering on office, must be managed with discretion, and with a due regard to the interests of the estate. In a case where the accountant of Court had made an order for consignation of a sum of upwards of £25,000, being the value of shares of the Western Bank belonging to a minor, on the ground that the tutor-at-law ought to have realized the funds and prevented loss, the Court unanimously recalled the order. The shares were an investment by the father, and had been held by him for a number of years before his death. The order of the accountant was not made till more than two years after his death, and the tutor had then been unable to find a purchaser. Lord Deas observed: 'Assuming that neglect to sell the shares might in certain circumstances make the tutor liable for their value, I cannot have any doubt that it is a very different question, and turns on very different grounds, whether the tutor is liable for allowing such investments made by the deceased to remain unchanged, and whether he would be liable had he made them himself. In the latter case, the presumption would be against him; in the former, it is rather in his favour. If a tutor calls up one investment, he must make another, and it is right he should pause before he substitutes his own choice for that of the deceased. He has a duty as to income as well as a duty as to security. There is some hazard attending all investments, even deposits in banks; and a tutor may happen to incur more hazard in changing investments, than in leaving them unchanged. There is no rule requiring a tutor to sacrifice the estate by immediate realization. Take this very case. The estate, to the value of more than £150,000, consisted of shares in joint-stock iron and other companies, which could not have been thrown at once into the market and disposed of except at an enormous sacrifice. Would the tutor have been justified in doing that? In my opinion, to have done so would have been violating and not performing his duty. By taking a different course, there was great gain in place of great loss in all this large estate, except the bank shares. The course followed was not speculation, but prudent winding up' (*a*).

Tutors as well as trustees are entitled to take all proper measures to prevent loss to the estate under their management. Thus, a judicial factor has been found entitled to sue an action

(*a*) *Accountant of Court* v. *Baird*, 29 June 1858, 20 D. 1176.

against a co-trustee of the party whose estate was under his management, to have certain funds reinvested in terms of the trust deed, the uplifting of which left the representatives of the deceased trustee liable, in the event of loss, to a claim of damages (*a*).

Repairs on property.

The estate administered may consist of subjects liable to decay, and requiring reparation; in which case it is incumbent on the tutor to take care that the necessary repairs be timeously made (*b*).

Improvements on estate.

Where the subjects cannot be repaired, and are liable, if retained as part of the estate, to deteriorate, it is the tutor's duty to sell them. Thus, in one case where the curator applied for special powers to thin plantations of growing timber, and to sell wine which was deteriorating through age, the Court refused the petition as unnecessary, the Lord Justice-Clerk observing: 'This is not an application to borrow money for the improvement of the estate, or anything of that kind; the curator must just thin the wood and sell the wine as seems most expedient to himself' (*c*). But he is not entitled to expend the pupil's money in improvements, the policy of which is at the time doubtful, and the results of which may be unfortunate; or even where the thing done, though not in itself a loss, yet might have been dispensed with without detriment to the pupil (*d*). A tutor cannot build new mansion-houses, though he is bound to take care that one already on the estate, 'if it was left habitable by the deceased, be preserved in good condition' (*e*). The expenses of such repairs may be liquidated from the pupil's other funds; and it is competent for the tutor to uplift the money contained in heritable securities, and to apply it to the making repairs on the mansion-house, 'since the benefit thereof was to accrue to the heir and not to the executor' (*f*). It has been held that a tutor-at-law may effect permanent improvements on an entailed estate, and may, under authority of the Court, apply consigned monies in repayment thereof (*g*). In one case, where almost the only property of his ward was a ship, a judicial factor was credited

(*a*) *Watson* v. *Crawcour*, 9 June 1843, 5 D. 1182.

(*b*) Ersk. i. 7, 24; Code v. 37, 22; Warnkönig, Com. Juris Romani, vol. iii. p. 173; 1 Domat 267, No. 3.

(*c*) *Maconochie*, petr., 15 July 1853, 2 Stuart 567.

(*d*) See *Graham* v. *Hopeton*, M. 5599 (1798).

(*e*) Ersk. i. 7, 24; *Graham*, *ut sup.*

(*f*) *Hill* v. *Maxwell*, M. 16276 (1665).

(*g*) *Stuart* (*M. of Bute's Tutor*), 10 Feb. 1855, 17 D. 378.

with sums expended on its repair; but an opinion was expressed that he ought to have applied for special powers (*a*).

Investing of the pupil's funds.

III. The tutor is bound faithfully to administer and invest the rents, profits, dividends, and interests of the pupil's estate. The old rules and the new upon this subject entirely differ.

By the old law (*b*), the tutor was bound to lay out at annual rent all principal sums coming to the pupil during the tutory (*c*); to stock and employ at annual rent all the bygone annual rents due to his pupil before the commencement of his tutory within a year after his entry on office (*d*); to stock and employ at annual rent the rents of lands and houses within half a year after they fell due, unless the rents were victual, in which case a year was allowed (*e*); and to stock and employ at annual rent *finita tutela*, but not till then, the annual rents falling due *pendente tutela* (*f*). The tutor was not bound to uplift the annual rents from the debtors (if responsible) more than once during the tutory (*g*).

By the modern law, tutors and curators must invest the pupil's revenues as follows:—1. They must bring their accounts to an annual balance. 2. For all the money received, or which ought to have been received, by them during the currency of each year, they must give bank interest on current accounts, *de die in diem*, to the end of the year (*h*), when the account must be closed, and a balance struck. Probably the old period of six months would be

(*a*) *M'Leod*, 5 Dec. 1856, 19 D. 133. See *infra* as to factors.

(*b*) See the old rules in Stair. i. 6, 19; Ersk. i. 7, 25.

(*c*) *Wilson* v. *Foulis* (1683), M. 502; *Guthry* v. *Guthry* (1627), M. 507. See *Davidson* v. *Jack* (1634), M. 506, where, however, the tutor having died soon after uplifting the sums, and there being a delay of twenty-five years, the tutor's heir was only found liable in annual rent from the date of intenting action against him: *Wilson* v. *Foulis* (1688), M. 16312 and 505.

(*d*) *Duff* v. *Tailors of Edin.* (1684), M. 3507; *Douglas* v. *Gray* (1673), M. 501; *Spalding* v. *Farquharson*, 19 May 1809, and 15 May 1811, F. C.

(*e*) *Irvine* v. *Spence* (1696), M. 501; *Sutties* v. —— (1669), M. 16280—a very distinct case; *Hay* v. *Tweeddale* (1678), M. 502.

(*f*) *Duff* v. *Tailors of Edinburgh*, *supra*; *Douglas* v. *Gray*, *supra*; *Hay* v. *Tweeddale*, *supra*; *Kintore* v. *Boyd* (1665), M. 503; *Lockhart* v. *Elies* (1682), M. 504; *Nasmyth* v. *Nasmyth* (1629), M. 16251; *Rose* (1678), M. 16296; *Hamilton* v. *Veitch* (1679), M. 505; *Charters* v. *M'Morran* (1687), M. 16310; *Kintor* v. *Logan* (1669), M. 509; *Spalding* v. *Farquharson*, and *Wilson* v. *Foulis*, *supra*.

(*g*) *Kintor* v. *Logan*, *supra*; *Anon.* (1669), 2 Sup. 442.

(*h*) The Court, in the case of *Montgomerie* v. *Wauchope*, 4 June 1822, F. C., found this should be three per cent., because such was the interest at that time given by the banks.

allowed the tutor for recovering the rents, etc., before interest *de die in diem* would begin to be charged. But this point has not been settled by any late decision. In one case (*a*), the Court allowed twelve months instead of six, in respect that the debts were numerous. 3. After deducting such a sum as may be considered just and reasonable for meeting the current expenditure, the remainder of the annual balance must be lent out at such interest as is generally obtained at the time for money heritably secured. In regard to trust estates it may be regarded as settled, that where the trust deed gives no power to lend on personal security, the funds ought to be invested either in Government securities or in heritable bonds (*b*). A similar rule may be laid down as to investing the funds of the tutory, qualified however by the higher discretionary power reposed in the tutor in virtue of which he has been held entitled to purchase land as an investment of funds (*c*). If securities be easily obtainable, the annual balance must be lent out within three months after the expiry of the year, during which interval the money will carry bank interest only; and after the three months, the tutor will be charged with the same interest that would have been obtained for it had it been lent out on heritable security, provided that heritable security could by ordinary diligence have been obtained. 4. If the pupil's money be lying in the hands of debtors without bearing interest, the tutor must recover it from them, and lend it out at interest as already mentioned; and he is also bound to sell off perishable property, and reinvest the funds in the same manner as above mentioned (*d*).

5. If a tutor accounts according to rule 3, by giving the usual interest obtainable for money lent on heritable securities, after the expiry of three months from the striking of the annual balance, it was in one case found that he is not obliged to account for the *actual profits* he may have made of the money in his own speculations with

(*a*) *Kilpatrick* v. *M'Alpine*, 17 May 1799, not reported; but reported on other points, M. 16381.

(*b*) *Haldane*, petr., 23 Dec. 1848, 11 D. 286; *Lindsay*, petr., *ibid.*; *Accountant of Court* v. *Geddes*, 29 June 1858, 20 D. 1174. See also *A. B.*, petr., 29 June 1854, 16 D. 1004, subsequently as *Morison*, 5 Dec. 1856, 19 D. 132, where the Court refused to sanction an investment of the funds of a factory in railway securities. Trustees have frequently been found personally liable for loss arising on investments merely on personal securities.

(*c*) See *infra*, p. 241.

(*d*) Ersk. i. 7, 25. See *Maconochie*, petr., 15 July 1853, 2 Stuart 567.

it, even though these may be much larger than such interest (*a*). But this decision is not law. The case of *Wauchope* was compromised on an appeal being threatened; and it has now been conclusively ruled that the actual profits must be accounted for (*b*). Where trustees (under a trust deed directing them to invest in a particular way the sum of £1000 provided to one of the truster's daughters), who were partners of a trading company, retained this sum in their own hands, paying to the beneficiary interest at the rate of five per cent., they were found liable to account to the beneficiary for all profit over and above five per cent. which they had made by retaining the money in their own hands uninvested. Lord Cowan observed: 'Generally, it may be stated that every trust implies duty in the person entrusted, and that duty carries with it corresponding obligation. The extent to which a breach of that obligation will infer legal responsibility, must vary with the nature and character of the trust. But whatever doubt may be supposed to have been thrown upon the principle by the case of *Montgomerie* v. *Wauchope*, I do not think it admits of question that the law of Scotland has ever been, that persons in the position of trustees for others must account for whatever advantage or profits have accrued to them through their dealings or intromissions with the funds entrusted to their management. This principle will be found to prevail wherever there attaches to the office a fiduciary character; and if in any case a different rule has been applied, it has been in circumstances entirely of an exceptional nature' (*c*). In a case decided very shortly after by the First Division, the same principle was recognised; and a trustee who had failed to withdraw from the business of the copartnery funds directed to be invested in a particular way, was found liable to account to the beneficiaries not only for interest,

(*a*) *Montgomerie* v. *Wauchope*, 4 June 1822, 1 S. 453, and F. C.

(*b*) *Cochrane* v. *Black*, 1 Feb. 1855, 17 D. 321. See also *Guthrie*, 16 Dec. 1853, 16 D. 214; *Laird* v. *Laird*, 26 June 1855, 17 D. 984.

(*c*) *Cochrane* v. *Black*, *supra*. In a subsequent stage of this case, 16 July 1857, 19 D. 1019, it was decided that, in ascertaining the amount of profits made on the trust funds wrongously retained in their hands, the trustees must take into account not only the input capital of the partners, but also all other sums obtained on loan or otherwise and invested in the partnership business, and that the proportion borne by the trust monies to the whole funds so invested regulated the share of profits to be made over to the beneficiary in the trust.

but also for the actual profits realized (*a*). Tutors-at-law and tutors-dative are subject to the same rules of accounting and investment of funds as judicial factors (*b*). These will be fully explained in treating of judicial factors.

Tutors.

Tutors and trustees who allow the pupil's funds to be invested in trade, are not only accountable for all the profits they may realize, but are personally liable to make good any loss which may thus arise (*c*).

The question of a tutor's liability for his pupil's funds lost through his neglect or mal-administration is one which has attracted largely the attention of the Roman lawyers (*d*). There can be no doubt that the employment by the tutor of the pupil's funds in speculative schemes of his own is an abuse of trust, a violation of the duty of a guardian, and would be peremptorily checked on a complaint to the Court (*e*).

The preceding rules as to accounting were first settled by two cases of modern date, though it is stated in the Session Papers of one of them (*f*), that there have been several others to the same purpose, but all unreported (*g*). They have since been applied in various cases (*h*).

Funds of pupil should be invested in Scotland.

Tutors must keep the funds invested in this country, and subject to the orders of the Court of Session. Questions in regard to this matter have frequently arisen where there was a double guardianship under appointment of both the English and Scotch courts. Thus, in one case where a domiciled Scotchwoman possessed

(*a*) *Laird* v. *Laird*, 26 June 1855, 17 D. 984.

(*b*) 12 and 13 Vict. c. 51, sec. 3, 4, 5.

(*c*) *Dicta* in above cases. *Bon Accord Insurance Co.* v. *Souter's Trs.*, 11 Dec. 1850, 13 D. 295. See *dicta* of Lord Deas in *Baird*, *supra*, p. 233.

(*d*) Dig. xxvi. 7, 7, s. 3 to s. 12; Code v. 51, 3; 3 Warnkönig Com. Juris Romani, p. 175.

(*e*) *Elphinston* v. *Robertson*, 28 May 1814, F. C. p. 627; Ivory's note, 214, to Erak. i. 7, 19. See *Ritchie* or *Lambe* v. *Ritchie*, *supra*, p. 231 (*g*).

(*f*) *Montgomerie* v. *Wauchope*, *supra*.

(*g*) *Hamilton* v. *Marshall*, 25 Feb. 1813, F. C. This case is misreported. See the Session Papers, and the explanation of it given in the case of *Montgomerie* v. *Wauchope*, 8 April 1816, 4 Dow 109, and finally in Court of Session, 4 June 1822, Fac. Coll. and 1 S. 453, the leading case on this subject, which was litigated in the Court of Session and House of Lords for fifteen years; and in the papers in which the whole law is elaborately discussed. See also *Elder* v. *Elder*, 14 Nov. 1832; *Ritchie* or *Lambe* v. *Ritchie*, *supra*, p. 231 (*g*); *Ralston* v. *Eaton*, 3 Feb. 1826, 4 S. 421.

(*h*) *Cochrane* v. *Black*, *Laird* v. *Laird*, and other cases, *supra*.

of considerable property in Scotland, both heritable and moveable, became insane during a temporary residence in England, and a *curator bonis* was appointed in Scotland, and a commission of lunacy afterwards sued out in England, the Court of Session, in an application by the committee on the lunatic's estate praying to have the *curator bonis* ordained to pay over the funds in his hands to the petitioner as her committee, to which answers were lodged for the *curator bonis*, refused the prayer *hoc statu;* and on a further petition to have the *curator bonis* ordained to hand over to the committee the free proceeds of the lunatic's estate, which was opposed by the *curator bonis* on the ground that the superplus over and above what was necessary for the lunatic's support fell to be distributed according to the law of Scotland and not of England, the Court appointed the petitioner to state what sum was necessary for the support of the lunatic, and then gave decree for £310 per annum, the sum named by him (*a*). In a later case, where the pupil having succeeded to estates both in England and Scotland, a guardian had been appointed in England, and a *curator bonis* to manage the heritable property in Scotland, an application was presented by the English guardian to have the *curator bonis* ordained to pay over the interest due and to become due on certain heritable bonds, the property under his management, and also to pay over the principal sums themselves. The prayer of the petition, so far as regarded this last, was not insisted in, in respect of the judgment in *Murray* v. *Baillie;* and the Court, while they ordained the *curator bonis* to pay over the whole annual interest under deduction of all proper charges, *quoad ultra* refused the prayer of the petition (*b*). The same point again occurred, where a judicial factor had been appointed on a Scotch heritable bond for £22,000, part of the estate belonging to a domiciled Englishman at his death, and to which, as being Scotch heritage, and so not directly carried by an English will, his son, a pupil, was heir. There were large estates in England also, and the succession of the deceased, who left issue not only the pupil, but also two daughters, fell to be regulated by his will. There was thus a question of election whether the pupil, to whom large provisions were made by the will, should take under it, or should re-

(*a*) *Murray* v. *Baillie*, 24 Feb. 1849, 11 D. 710.

(*b*) *Hardwick* or *Allen* v. *Robertson*, 24 Nov. 1855, 18 D. 97.

nounce and claim as heir the Scotch heritable bond. The Lord Chancellor elected on behalf of the pupil to take under the will, and empowered the English executors to present a petition to have the judicial factor ordained to hand over to them the principal and interest of the heritable bond. On this application being presented to the Lord Ordinary, with answers by the judicial factor, he superseded it *hoc statu* with a view to an application being made for the appointment of a factor *loco tutoris* to the pupil, and then, upon an application by him for special powers, the Lord Ordinary authorized him to make up a title to the bond in the person of the pupil; and after remitting to the accountant of Court, and taking the opinion of English counsel as to the meaning and effect of the proceedings in Chancery, he authorized and empowered the factor *loco tutoris* to dispone, convey, and make over the said heritable bond and the interest due thereon to the English executors as prayed for (*a*).

In ordinary cases where no conflicting jurisdiction exists, the rule is, that the funds must be kept in Scotland, and subject to the orders of the Court. Thus, where the property belonging to a lunatic was insufficient to yield a sum adequate to his support, the *curator bonis* having in his petition for special power to employ the capital in the purchase of an annuity suggested the Anchor Insurance Company in London as an eligible office, the First Division expressed great doubts as to the propriety of investing the funds out of Scotland, and only granted authority to purchase the annuity from a Scotch office at the sight of the Lord Ordinary (*b*). Again, where a *curator bonis* had invested funds of his ward in consols in name of himself, and of a party resident in England, who, when desired to transfer them to the sole name of the curator, or to sign a declaration of trust to the effect, *inter alia*, that he held them subject to the orders of the Court of Session, refused on the ground

(*a*) *Roger Montgomerie*, petr., 24 June 1858—original petition, by the executors of C. J. S. Montgomerie Lamb of Beaufort, to have the judicial factor on his heritable estate in Scotland ordained to transfer to trustees an heritable bond of £22,000, dated 12 Nov. 1857, with answers dated 5 Dec. 1857.

(*b*) *Gavin Paisley*, petr., 5 March 1857, unreported. In this case the Court only applied a general rule, which it is *pars judicis* to apply when it appears that the tutor or other factor is withdrawing the funds from the jurisdiction of the Court.

that he considered himself responsible to the Court of Chancery, the Court ordered the curator within ten days to consign the sum of £41,767, 1s. 3d. in one of the chartered banks in Scotland on a deposit receipt, bearing 'that it is consigned for behoof of said trust estate, and subject to the orders of this Court; or to produce in process good and sufficient evidence that the sum is invested in Government securities in the sole name of the said curator, and is under his control as curator, and so as to be subject to the orders of this Court upon him' (*a*).

Can tutors purchase lands or houses?

It was the opinion of Stair, that the tutor could not purchase land with the pupil's money, any more than he could sell his estate (*b*). But this doctrine was departed from, at first by the tutor's obtaining the interposition of the Court to the purchase (*c*), and finally by his making the purchase, as an ordinary act of administration, in the same way as he might lend out money on heritable security (*d*). A tutor cannot purchase house property (*e*). It is thought, however, that tutors have no right to embark their pupil's funds in any *new* lease, or other temporary occupation of land, although it will be held in most cases an incumbent act of administration to continue a lease held by the pupil's father (*f*). Tutors are not entitled to lend to themselves on heritable security, far less on their own personal security (*g*). Good heritable bonds or Government securities are the proper investments for the funds of the tutory (*h*). Where the borrower fails, and the debt proves irrecoverable, the tutor will be liable for the loss, only in the case where he has taken insufficient security, or lent to one notoriously insolvent (*i*). In one case a *curator bonis* was found liable in a sum of £2000 lent upon the security of a villa, on which a considerable

(*a*) *Accountant of Court* v. *Geddes*, 29 June 1858, 20 D. 1174.

(*b*) Stair i. 6, 36.

(*c*) *Craigie*, M. 7455 (1758); *Morton* v. *Muirhead*, M. 8931 (1749); Ersk. i. 7, 25; Bell's Prin. 2084.

(*d*) *Kennedy* v. *Innes*, 6 June 1823, 2 S. 375; Bell's Prin. 2084; Ersk. i. 7, 25; *Graham* v. *Hopeton*, M. 5599, No. 4 (1798); Bankt. i. 7, 36. See the Roman law to the same effect: Dig. xxvi. 7, l. 3, s. 2; l. 5; l. 13 Pr. Code v. 37, 24.

(*e*) *Lamb* v. *Chapman*, 24 June 1834, 12 S. 775.

(*f*) Hunter, Landlord and Tenant, vol. i. p. 200. See *infra*, chap. iii. No. 9.

(*g*) *Mercer Elphinston* v. *Robertson*, 28 May 1814, F. C.

(*h*) *Supra*, p. 233 (*b*).

(*i*) More's Notes, pp. xxxviii. xxxix.; *Gib* v. *Gib*, 5 Sup. p. 632, and Mor. 16363 (1769).

sum had been previously borrowed, and on which it was proposed to expend the sum thus arranged to be lent: proper precautions had not been taken to obtain a valuation. The Court, in finding the curator liable, dwelt much upon the fact that he was a paid officer; but the principle of the case is applicable to unpaid tutors (*a*). In any case, postponed securities ought to be carefully avoided.

Paying debts, and implementing other obligations, incumbent on the pupil.

IV. The tutor ought, as soon as he is in funds, to pay all debts owing by the pupil on the day when they fall due, lest either a pecuniary penalty be incurred through the delay, or the minor's property be seized for the debt (*b*). In order to free the tutor from litigating every case, and so exhausting his ward's property in the expenses of lawsuits, he is allowed to exercise a large discretion as to the payment of debts (*c*). If, however, he make payment of one not justly due, and to which there existed a valid defence, of which he was or might have been aware, he must account to the pupil for the money so thrown away, reserving his own relief by a *condictio indebiti* against the receiver of it (*d*). Should the claim be really doubtful, the only safe course for the tutor is, not to pay until the creditor's claim is fortified by the decree of a Court; and though he should be unsuccessful in the defence which he pleads, the Court will not in general amerce him in the expense of the litigation (*e*). The tutor may apply the annual income or other personal estate to the discharge of heritable obligations, though this appropriation of the funds might benefit the pupil's heir at the expense of his executor, and thus indirectly alter the succession (*f*). The Court refused a petition by the curator to a lunatic for special powers to present an application under the Entail Amendment Acts for authority to charge the entailed estate with debts and legacies left by the entailer, as it appeared from the trust

(*a*) *Forsyth*, 28 Jan. 1853, 15 D. 345.

(*b*) Stair i. 6, 18; Ersk. i. 7, 24; Bankt. i. 7, 29; Dig. xxvi. 7, 9, ss. 1 and 5; Dig. xxvi. 7, 13, 2.

(*c*) Ersk. i. 7, 24; Bankt. i. 7, 37; *Steven* v. *Boyd*, M. 500 and 16277, and 2 Sup. 432 (1666); Noodt, Opera, vol. ii. p. 560.

(*d*) Ersk. i. 7, 24.

(*e*) *Thomson* v. *Thomson*, 30 June 1840, 2 D. 1234; *M'Culloch* v. *Murray*, 19 Feb. 1805, not reported.

(*f*) *Graham* v. *Hopeton*, M. 5599 (1798). And see the converse of this case, *Halliday* v. *Winderim*, 2 Sup. 106 (1687), where a tutor granted a wadset over the pupil's heritage for a personal debt.

deed and deed of entail, which were executed of the same date, that it was the intention of the testator that these debts and legacies should be liquidated from the rental, and not be charged on the fee of the estate (*a*).

Can tutor give allowances to pupil's relations?

There are cases where the father of the pupil has been in the habit of voluntarily assisting his brothers and sisters, or other relations, by some yearly allowance not reduced to a legal obligation. Here the tutor has no alternative but to refuse payment, because the only rule he has to walk by is the simple one, that if the claim made against him cannot be enforced in a court of law, he cannot pay it (*b*).

Tutor debtor to the pupil.

If the tutor himself be debtor to his ward, he is held to have paid, from the earliest moment after his entry on the tutorial office at which the payment might have been demanded; and interest will run from that time in favour of the pupil (*c*).

Father's obligations must be implemented by the tutor.

It may be stated generally, that all obligations which transmit from the father against the pupil, whether to pay a sum of money or *ad factum præstandum*, must be implemented by the tutor, unless the thing to be done be of such a personal nature that no one could perform it but the deceased father of the pupil. An obligation, for example, to draw a painting or to execute a literary work, is of the latter class; but an obligation to feu ground or to extend a lease, unaccomplished at the granter's death, transmits against his heirs, and may validly be implemented by the tutors of his child (*d*).

Reference to tutor's oath.

In actions against the pupil, the tutor's oath will not be conclusive against his ward. If, for example, the subsistence of a debt can only be established by writ or oath of the defender—a pupil—he will not be bound by the oath of the tutor, though the latter had probable grounds of knowing all the circumstances connected with the constitution and subsistence of the obligation (*e*). There are

(*a*) *Lawson*, 20 July 1864, 2 Macph. 1422.

(*b*) *Drumelzier* v. *Tweeddale*, M. 16300 (1680). See the limitation to this rule, *infra*, Part iii. chap. i.

(*c*) Dig. xxvi. 7, 5, 4; Dig. xxvi. 7, 46; Code v. 37, 9; Nov. lxxii. c. 1, 2, 4.

(*d*) *Earl of Aberdeen* v. *Laird*, 26 Nov. 1823; Ersk. i. 7, 24, *in med.* See *infra*, chap. iii. No. 14, as to the tutor's liability for his ward's debts.

(*e*) *Eccles* v. *Eccles*, M. 16270 (1664); Stair i. 6, 20; *Mein* v. *Gray* (1699), 4 Sup. 449; *Malloch* v. *Graham* (1673), 1 Sup. 681; *Wadell* v. *Wadderston* (1707), M. 12484.

exceptions to this rule, in special cases, where the tutor has been mixed up with the transaction (*a*).

Making up titles and entering vassals.

V. A tutor is bound to make up the pupil's titles to the heritage of his ancestors; and whether his estate be heritable or moveable, the pupil, and not the tutor, ought to be served to the former, and confirmed to the latter (*b*). If, by neglecting to complete the titles of his ward, any loss or damage should accrue to the latter, the tutor is bound to liquidate the damage thus sustained (*c*). The making up of the pupil's titles is within the ordinary powers of the tutor-at-law, but the Court have sustained an application by a tutor-at-law for special power to complete the pupil's titles (*d*). If the succession taken up turn out to be prejudicial to the pupil, *gestio* will not be inferred against the latter, unless in the accounting with the tutor he accept the succession and homologate the management. He may reduce the act as being to his lesion (*e*). The vitious intromission of the tutor will not infer its usual liabilities against the pupil (*f*). Tutors may enter vassals (*g*), but a practice has come into vogue of applying for special power to the Court to authorize this (*h*).

Submissions and transactions entered into by tutors.

VI. A tutor may enter into submissions relative to any of the disputed moveable rights of his ward (*i*). But if the latter can establish, within the *quadriennium utile*, that he suffered enorm lesion by the submission, the whole proceedings will be reduced (*k*). With reference to heritage, the later Roman law did not allow tutors to enter into submissions or compromises (*l*). Erskine does not seem to be decided as to whether or not this is the law of Scotland (*m*). It is the opinion of Mr Montgomerie Bell, in his book

(*a*) *Hepburn* v. *Hamilton* (1661), M. 12480; *Hay* v. *Ogstoun*, M. 16276 (1666); *infra*, chap. iii. No. 14.

(*b*) Craig ii. 12, 14; Ersk. i. 7, 24; *supra*, p. 150.

(*c*) *Edmiston* v. *Edmiston*, M. 16264 (1635); Ersk. *ibid.*

(*d*) *Waddell*, 19 Feb. 1851, 13 D. 739.

(*e*) Stair iii. 6, 7. See this subject fully treated afterwards, Part iii. *infra*.

(*f*) *Kerr* v. *Bremner*, 9 May 1842, 1 Bell Ap. 280.

(*g*) Ersk. i. 7, 17; Bell, Prin. 2084; *Mackay* v. *Houston*, M. 16384 (1796).

(*h*) *Infra*, Part v.

(*i*) Bankt. i. 7, 29; Ersk. i. 7, 18; *Aitkenheads* v. *Aitkenheads*, M. 16331 and 977 (1711); *Aiton* v. *Scott*, M. 16331 (1711); *Balfour* v. *Forbes*, M. 16318 (1700); *Brown* v. *Scoular*, M. 16359 (1758). See *Maitland* v. *Mitchell*, M. 641 (1796). Montgomerie Bell on Arbitration, p. 98.

(*k*) *Dicta* in these cases, and *infra*, Part iii. chap. i.

(*l*) Code v. 71, 4.

(*m*) Ersk. i. 7, 18.

on the Law of Arbitration, that, as a tutor does not possess the power of alienating, burdening, or otherwise disposing of the heritage of the pupil by any direct deed of his own, it would seem *a fortiori* to be beyond his power to do this through the medium of a submission (*a*). On the other hand, it may be observed that tutors may litigate as to the pupil's heritage, and are by statute in certain cases authorized to refer a dispute, as to the price of land, to arbitration (*b*); and while such a power must be cautiously exercised, there are many cases in which it would seem to be very proper that, either on their own responsibility, or upon special application to the Court, such a power should be competent to them. The point is, however, yet undecided. The submission falls by the failure of the tutor or quorum, or by the death of the pupil, upon the ground that a submission is nothing but a mandate, which must terminate with the existence of the parties to it. But a submission entered into by a tutor does not fall by the arrival of the pupil at puberty. This is an exception to the rule, that a submission only exists as long as the tutory does. The marriage of a female ward, however, puts an end to the submission (*c*). A decree arbitral, pronounced in a submission entered into by a tutor, will not form a sufficient ground for a summary charge against the pupil on his arrival at puberty. An ordinary action must be brought (*d*).

Such being the power of a tutor to refer the disputed interests of his ward to the arbitration of neutral men, it is a step farther to hold, that he is entitled to take this power into his own hands, and to compromise and transact claims according to his own sense of what is just and expedient. This power, however, is given to tutors, provided the rights in dispute be of so doubtful a character that there would be no certainty of obtaining the full measure of his demands by embarking in a law-suit. In all matters of this kind, the tutor should act under the sanction of legal advice; which would at least establish his *bona fides*, if it would not save him from

(*a*) Law of Arbitration, p. 101.

(*b*) 8 and 9 Vict. c. 19, s. 6 to 10.

(*c*) See all these principles illustrated in *Maitland* v. *Mitchell*, M. 641 (1796), but better stated in Hume, Session Papers, Adv. Lib. vol. for 'Summer 1796,' No. 7, with MSS. notes of opinions of Court on the papers.

(*d*) *Ayton* v. *Scott*, Mor. 14997 (1711). Bell on Arbitration, p. 356.

responsibility (*a*). This doctrine has been confirmed by a late decision relative to trustees (*b*).

Power of alienating, burdening, and assigning the pupil's property. Moveables.

VII. (1.) The tutor's powers over moveables are held to be far more extensive than over the pupil's heritage; and, indeed, with regard to the former, they are, with few exceptions, absolute and unlimited (*c*). He is bound, indeed, to dispose as soon as possible of all that sort of property, the keeping possession of which would be productive of loss; such as fruits, corns, and commodities of a like nature, and superabundant cattle; and if, by his neglect to dispose of these, loss has supervened, he is liable therefor (*d*). This, of course, must be taken under the qualification that the goods are saleable (*e*). Even with regard to moveable property, which would not perish by being kept, it seems to be agreed that the tutor has free power of alienation (*f*). No exception is made by Erskine of the most valuable and durable materials, and he only thinks that the sale might afterwards be reduced on proving lesion (*g*). The tutor, in selling perishable goods, must do so at the highest prices. If a higher rate could be obtained for farm produce than the fiars' prices, that price must be allowed to the pupil (*h*). No gift can be made by the tutor of any part of his ward's property; and if he should have granted anything in this way, the deed of donation may, at the minor's instance, be reduced (*i*).

Can tutor assign personal rights?

By certain old decisions it was found, that debts constituted by personal bond or bill, or any other personal obligation, though they

(*a*) *Aitkenheads* v. *Aitkenheads*, M. 16331 (1711). See also Bankt. i. 7, 29; Ersk. i. 7, 18; Vinnius Tract. de Transactionibus, cap. 3, No. 7; and Tract. de Pactis, cap. 15, No. 4.

(*b*) *Cleland* v. *Brodie*, 13 Nov. 1844, 7 D. 147.

(*c*) Ersk. i. 7, 17 and 24; see Stair i. 6, 18.

(*d*) Dig. xxvi. 7, 7, 1; Code v. 37, 24; Ersk. i. 7, 24 and 25; 1 Domat, p. 272, No. 13. The disposal of wine deteriorating through age is within the discretion of the curator. *Maconochie*, 15 July 1853, 2 Stuart 567.

(*e*) *Stevin* v. *Boyd*, M. 16277 (1666). Here the pupil had 'some old unfashionable ware,' for which a purchaser could not be had.

(*f*) Ersk. i. 7, 17.

(*g*) Ersk. *ibid.* And see the tutor's powers as to the management of a farm, *M'Feggan* v. *Murray*, Hume, p. 887 (1805). But see other authorities which limit the tutor's powers as to the alienation of certain moveables, such as family jewels. Wal. p. 326; Bruce, Tutor's Guide, p. 338; Domat's Civil Law, vol. i. 272, No. 15.

(*h*) *Murray* v. *his Tutor*, M. 16267 (1662).

(*i*) Code v. 37, 16; Dig. xxvi. 7, 22; Code v. 71, 4; 2 Noodt, Opera 560.

could be uplifted by the tutor, yet they could not be assigned to third parties, because (it was held) that this was no necessary act of administration (*a*). Nay, Erskine lays it down that the assignation by a tutor of a bond, in which the minor is creditor, is discountenanced in our practice, even though the conveyance should be granted in consideration of necessaries applied for the minor's own use; 'for the guardian ought, in that case, to have granted bond for these necessaries, which law would have supported against the pupil, in so far as the sum contained in it was profitable to him' (*b*). The decisions, even in the old law, were not uniform (*c*), and the doctrine is now exploded (although it still stands uncorrected in the institutional works): 1*st*, Because the most valuable moveable corpora may be alienated, and there is no reason why a different rule should be applied to bonds; 2*d*, Because the most common mode of uplifting a debt thus lent out, when the debtor is himself unable to pay, is by assigning the security to some third party, willing thus to invest his money; and 3*d*, Because, if, instead of paying off a debt by selling or assigning some of the pupil's property, the tutor should adopt the course suggested by Erskine, viz. to borrow, this might turn out a very disadvantageous mode of dealing for the pupil, as he would be obliged to pay interest for the money so borrowed, perhaps higher than he received for his own. Accordingly, even Stair held that the assignation would be inept only when the tutor assigning was insolvent, and known to be so by the assignee (*d*). The rule now therefore is, that such powers of assignation and alienation belong to the tutor; and before the assignation can be set aside at the instance of the pupil, it will be necessary for him to show that he was lesed through the transaction, which he is not bound to do in regard to deeds *ipso jure* null. This was decided in an unreported case, where the Court held the tutor entitled to assign even an *heritable* bond as the best means of uplifting it (*e*). The tutor can, and (if it be demanded) must, grant

(*a*) *Geddes* v. *Dousie*, M. 16250 (1629); *Lands* v. *Douglas*, Mor. 16250, and 1 Sup. 173 (1629); *Campbell* v. *Dougal*, M. 16279 (1667); *Crawford* v. *Canongate*, M. 16315 and 7866 (1694); Bankt. i. 7, 29.

(*b*) Ersk. i. 7, 19.

(*c*) *Weir* v. *Arnot*, M. 16266 (1636); *Justice* v. *Queensberry*, Mor. 16269 (1664).

(*d*) Stair i. 5, 12.

(*e*) *Neilson* v. *Robertson*, 22 Nov. 1771; Arniston Sess. Papers, vol. marked 102–104, Adv. Lib.

an assignation in any case where the cautioner for the principal debtor has paid the debt (*a*).

Alienation of heritage.

(2.) With regard to heritage, corporeal and incorporeal, it is a rule of the law of this country recognised from the earliest times, that tutors cannot alienate it without the previous authority of the Court of Session (*b*).

Powers granted by Court to sell heritage.

Such authority will not be granted as of course, even where tutors have a power of sale conferred on them, if they should think it necessary for the interests of the children (*c*). It is with some hesitation that the Court grant a power of sale even to factors *loco tutoris* and other officers of their own appointment; and their reluctance to do so is greater in the case of tutors, especially of tutors-at-law (*d*) and tutors-nominate, and fathers, who find no caution (*e*). As a general rule, it may be stated that a power of sale must be shown to be necessary for the ward or his estate, before the Court will grant it. No views of expediency or of advantage, however great, will be sufficient. The Court gives no favour to a petition for authority to sell where the object is not to avoid a threatened loss, but to obtain an expected advantage. Such was the ground of decision in the case of *Vere*, where the Court, on challenge by the heir after majority, went back upon and reduced a decree authorizing the sale of lands by a tutor. 'As this measure was at best only an object of apparent advantage, and not of urgent necessity to the pupil's affairs, the Lords sustained the reasons of reduction' (*f*). In a subsequent case, the Court refused an application for such power by a father as administrator of pupil children, where the houses were ruinous and the lands unproductive, for this reason, 'that great necessity was the only ground on which the Court could authorize the sale of a minor's estate, and that no views

(*a*) Ersk. i. 7, 19.

(*b*) 2 Stat. Rob. I. c. 8; Stair i. 6, 18; Bankt. i. 7, 29; Ersk. i. 7, 17; *Dickson* v. *Torrie*, Elch. *v.* Tutor, No. 15 (1742); *Ratio* in *Thomson* v. *Stevenson*, M. 8982 (1666); also *Davidson* v. *Mackenzie*, 31 May 1826, 4 S. 632, when an objection was sustained to a claim of enrolment founded on a disposition of land granted by tutors *sine decreto pretoris*.

(*c*) *Parrot* v. *Fraser* (1810), Hume, p. 889.

(*d*) *Dicta* in *Waddell*, 19 Feb. 1851, 13 D. 739.

(*e*) *Sawers*, 9 Mar. 1850, 12 D. 905; *Graham* or *Young*, 21 Jan. 1852, 14 D. 357, and 1 Stu. 292; *White*, 7 Mar. 1855, 17 D. 599.

(*f*) *Vere* v. *Dale* (1804), M. 16389.

of expediency, however clear, were sufficient' (*a*). In a later case, where a factor *loco tutoris* had applied for authority either to sell a lease or to subset the lands, the Lord President (Hope) observed in reference to the former of these powers, which was not granted, 'The Court very rarely grants power to a factor *loco tutoris* to sell the pupil's heritage. For even though we did so, he might reduce the sale after majority if he could plead lesion' (*b*). The cases in which the Court have granted such a power have been cases in which the property was so small as to afford no adequate subsistence to the ward, or was so burdened with debt and threatened diligence that it was necessary to sell it in order to avoid ruinous loss (*c*). In other cases, where the transaction was only shown to be highly expedient or advantageous, the Court have refused it (*d*). In the case of *Boyle*, which was an application under the Entail Amendment Acts by a factor *loco tutoris* to a pupil heir of entail for authority to feu, the previous heir in possession having all but carried through a petition for authority to feu to enable him to implement an agreement entered into with a water company, the Lord Ordinary (Curriehill), whose opinion was indorsed by the judges of the First Division, thus stated the law, there having been a special remit made to him to consider the competency of the application: 'In the opinion of the Lord Ordinary, the Court cannot competently grant the prayer of the petition. This is to be regretted in the present case, because there can be little doubt that the proposed transaction would be very beneficial to the pupil and to the entailed estate. But since the judgment in the case of *Vere*, it appears to have been settled that the heritage of a pupil cannot be alienated by his tutor or factor *loco tutoris*, however beneficial the transaction might be expected to prove, and even although the alienation be in the form of a feu, unless such a transaction be necessary to save the ward or his estate from actual loss' (*e*). Similar views were expressed and given effect to by the majority of the

(*a*) *Finlayson*, 22 Dec. 1810, F. C.

(*b*) *Slade*, 20 Dec. 1831, 10 S. 167. See also *dictum* of Lord Curriehill in *Boyle*, *infra*, and Lord Deas in *White*, *infra*.

(*c*) *Mackenzie*, 27 Jan. 1855, 17 D. 314; *Finlayson* v. *Kidd*, 4 June 1835, 13 S. 861; *Wilson*, 11 Dec. 1834, 13 S. 176; *Melville*, 8 Mar. 1850, 12 D. 914.

(*d*) *Graham*, 21 Jan. 1852, 14 D. 357; *Waddell*, 19 Feb. 1851, 13 D. 739; *Boyle*, 19 Feb. 1853, 15 D. 420; *White*, 7 Mar. 1855, 17 D. 599.

(*e*) *Boyle*, petr., *supra*.

First Division in a later case, bearing, however, more immediately upon the power to borrow money (*a*).

This subject, as to extraordinary powers granted by the Court to guardians, will be more fully discussed hereafter in a distinct section of this work (*b*).

The powers of tutors to alienate are thus very limited. Not merely are direct gratuitous or onerous dispositions prohibited, but original feu rights, however advantageous they may be, are regarded with disfavour (*c*). But the term alienation includes a variety of other indirect modes of transference of heritage, or of its privileges. Excambion of one field or house for another cannot be made (*d*). Servitudes upon the pupil's property, such as thirlage, or pasturage, etc., are disallowed (*e*), and a servitude attached to the pupil's estate cannot be renounced by the tutor (*f*). All deeds whereby a real burden is created over the property are prohibited; and so are all restrictions on the rights of proprietor, other than letting the subjects in lease (*g*). Deeds charging the subjects with a yearly payment, such as an annuity or a liferent (*h*); or an heritable bond, or even a disposition for no other purpose than the creating votes (*i*);—these are all deeds which the tutor is prohibited from granting, although they are not in every case *ipso jure* null. Where, however, an agreement which has been entered into by a father before his death, or by the ward before his incapacity, only requires a formal deed to its completion, the Court will grant the requisite authority to complete it (*k*).

What alienations a tutor cannot make.

(*a*) *White*, petr., 7 Mar. 1855, 17 D. 599.

(*b*) See *infra*, Part v. s. 2.

(*c*) Craig i. 15, 19; Ersk. i. 7, 17; *Thomson*, 10 March 1837, 15 S. 807; *Colt* v. *Colt*, 1801, M. App. Tutor 1; *Waddell*, 19 Feb. 1851, 13 D. 739; *Boyle*, 19 Feb. 1853, 15 D. 420.

(*d*) Ersk. i. 7, 17; Warnkönig, Com. vol. iii. p. 176.

(*e*) Ersk. i. 7, 17; Dig. xxvii. 9, 3, 5; *Douglas* v. *Robertson*, 2 July 1802, not reported. See Hume, Sess. Papers, Summer 1802, vol. i. No. 11. In this case it was found that the singular successors of the pupil's heirs, at the distance of 39 years, could reduce a negative servitude, constituted by the tutor over the pupil's estate, *sine decreto pretoris*.

(*f*) Dig. xxvii. 9, 3, 5; Dig. xxvii. 9, 5, 10, and also laws 11 and 12.

(*g*) Dig. xxvii. 9, 22; Dig. xxvii. 9, 46, 7; Code v. 37, 4, 15; Stair i. 7, 18; Bankt. i. 7, 29; Ersk. i. 7, 17; *Davidson* v. *Mackenzie*, 31 May 1826, 4 S. 632.

(*h*) Ersk. i. 7, 17.

(*i*) Statute, Rob. I. c. 8; *Hay* v. *Gordon*, 13 June 1788, not reported, but stated in Ivory's Erskine, note; *Davidson* v. *Mackenzie*, 31 May 1826, 4 S. 632.

(*k*) *Aberdeen* v. *Laird*, 26 Nov.

By the Entail Amendment Acts an heir of entail in possession may, under authority of the Court of Session, apply monies received as compensation for land which has been taken compulsorily by Act of Parliament, towards the extinction of debt incurred for permanent improvement on the entailed estate. If he be a pupil, this power may be exercised by his tutor (*a*). 'This proceeding cannot be objected to on the ground that this would be an alienation of the ward's heritage. The money is not *sua natura* heritage. If it partake of the nature of heritage, that is only because it is authorized and directed to be applied by the heir of entail in possession, under the authority of the Court, in one or other of several ways, for behoof of himself and of the heirs succeeding him in the entailed estate; and to apply the money to its destined purpose, for behoof of him and his subsequent heirs, not only is not an alienation of his heritage, but is not an alienation of any kind. It is an act of administration, and an act, too, of which the propriety cannot admit of question, because the statute requires the Court, before granting authority to make such an application of the money, to be satisfied of the propriety of the proposed application' (*b*). On the other hand, the tutor of an heir of entail cannot at common law feu any portion of his ward's estate, and the Entail Amendment Acts do not enlarge his powers in this respect (*c*). It has also been decided that tutors cannot, under the Entail Amendment Acts, exercise the power competent to an heir in possession, of granting a bond and disposition in security over the entailed estate in satisfaction of sums due under bonds of provision by preceding heirs (*d*).

Tutor may call up heritable bonds or assign them.

Erskine says, that heritage, as to this question, includes 'redeemable rights, and even infeftments of annual rent, though these are not, in strict speech, rights of property' (*e*). This would seem to imply, that a tutor cannot make an assignation of an heritable bond to a third party in the same manner as the old rule was as to

1823, 2 S. 527. See *infra*, Part v. s. 2. In *Mark*, 5 Dec. 1829, 8 S. 195, the Court authorized a factor *loco tutoris* to make up titles to an heritable bond *in bonis* of a distant relation of the pupil to whom he was heir-at-law, and hand it over to the parties to whom the proceeds were destined by will of the deceased, they paying the expense of the application.

(*a*) *Stuart*, 10 Feb. 1855, 17 D. 378.

(*b*) *Per* Lord Curriehill, *ibid.* p. 381.

(*c*) *Boyle*, 15 D. 420, *supra*.

(*d*) *Muirhead's Tutors*, 4 July 1849, 11 D. 1249.

(*e*) Ersk. i. 7, 17.

personal bonds. This doctrine is, however, not law now. It was first settled, that the tutor may demand payment of such heritable bonds at his own pleasure, and may grant an assignation or renunciation to the *debtor* (*a*); and thereafter the Court held, that he might get up the debt by making an assignation of the bond to a stranger (*b*).

Effect of an alienation by a tutor without the authority of the Court.

An alienation made by a tutor of the pupil's heritage, or a burden imposed on it, seems to be, in any question between the guardian and ward, *funditus* void and null, and may be set aside by way of exception without reduction (*c*). Where the tutor himself is the disponee, the pupil is entitled to the entire fruits of the property from him, just as if no alienation had ever been made; and no plea of *bona fide* consumption is competent to the tutor (*d*). It would seem that a different rule is applied to the case where the pupil challenges the right in the hands of an onerous third party. The sale or burden in this case is not *ipso jure* void, but will be sustained if profitable to the minor, although, if carried through without the previous sanction of the Court, lesion will be presumed (*e*). This is the doctrine which was impliedly sanctioned in a recent case (*f*); and it is in accordance with older precedents (*g*). It deserves, however, to be here noted, that Professor Bell has laid it down, that deeds of alienation 'are beyond the tutor's power; or at least the presumption of lesion is so strong that it is not to be refuted otherwise than by the previous sanction of the Court of Session' (*h*).

Exceptions showing that a tutor may alienate heritage without authority of Court.

To the general rule prohibiting alienations of the pupil's heritage, *sine decreto pretoris*, there are exceptions. 1. If power be given by the father to sell, the tutor may exercise such power, provided the property came from the father (*i*).

(*a*) *Lyon* v. *Farquhar*, M. 16272 (1665); *Graham* v. *The Earl of March*, M. 16339, and Elch. *v.* Tutors and Curators, and notes, 3 (1735).

(*b*) *Neilson* v. *Robertson*, 22 Nov. 1771, not reported. See Arniston Sess. Papers, vol. marked 102-104, Adv. Lib.

(*c*) Stair i. 6, 18; Bankt. i. 7, 29; *Dickson* v. *Torrie*, Elch. *v.* Tutors, 15 (1742); *Bontine* v. *Graham*, 20 Dec. 1838, 1 D. 286.

(*d*) *Bontine* v. *Graham*, 15 Nov. 1839, 2 D. 27.

(*e*) Kames' Principles of Equity, Book ii. ch. vi. p. 395; *Douglas* v. *Forman*, M. 16230 (1565).

(*f*) *Bontine* v. *Graham*, 20 Dec. 1838, 1 D. 286.

(*g*) See *infra*, p. 256 (*b*).

(*h*) 1 Bell's Com. 132.

(*i*) Dig. xxvii. 9, 1, 2; Code v. 72, 13. But see *Parrot* v. *Fraser* (1810), Hume, p. 889.

Where law will compel alienation, tutor may alienate.

2. If, from the nature of the subject, or the obligations of the deceased father, the law may compel a sale, the tutor may validly execute the conveyance, without the authority of the Court, if he be required to do so by the party who may compel the sale. Such is the case where the father has bound himself to dispone heritage, which he was prevented accomplishing by his death (*a*). Or where the pupil, being a titular of teinds, the heritor insists on purchasing them in terms of law, the tutor may here, *sine decreto pretoris*, execute the deed of sale (*b*). The renunciation of a right of wadset, or the discharge or assignation of an heritable bond, are deeds which may also be competently granted by the tutor alone (*c*). In like manner, a tutor may grant an alienation where his ward is joint owner of a property and any of the other *socii* insist for a division (*d*). But it is said that he cannot himself be the pursuer of an action of division (*e*). He may also, without any special authority from the Court, renew the investitures of the pupil's vassals; but he cannot give any right, either of property or of possession, not in the charters of the former vassal (*f*). Again, where he has no other funds to pay debts, he does not violate his duty by allowing adjudication to be led for debts justly due by the pupil (*g*).

Power to borrow money.

VIII. As the imposition of a burden on the pupil's estate is in truth an alienation of it, the general rule is, that a bond to this effect would be set aside, unless the previous authority of the Court had been obtained.

Powers granted by Court to borrow money.

In granting authority to burden the pupil's heritage, the Court follow the same rule as in sale, of requiring the tutor to show that the power asked is necessary, and not merely advantageous or expedient. In the case of *Wilson*, power was granted to the tutor-at-law to borrow money to pay off debts and legacies, the creditors,

(*a*) *Earl of Aberdeen* v. *Laird*, 26 Nov. 1823, 2 S. 527; Ersk. i. 7, 17; Bell's Prin. s. 2084.

(*b*) *Cardrosse* v. *Nepar*, 1 Sup. 371 (1637); *Graham* v. *Hopeton*, Mor. 5599 (1798); Ersk. i. 7, 17.

(*c*) *Graham* v. *March*, M. 16339, Elch. *v.* Tutors, No. 3 (1735); Bankt. i. 7, 29; Ersk. i. 7, 17; *sup.* p. 229 (*g*).

(*d*) Dig. xxvi. 7, 1, 2; Code v. 37, l. penult.; Noodt, Opera, vol. ii. p. 588.

(*e*) Dig. xxvii. 10, 5, ult.; Dig. xxvii. 10, 6.

(*f*) Craig ii. 3, 11; Stair i. 6, 20; Ersk. i. 7, 17; Bell's Prin. 2084; *supra*, p. 244, as in (*g*).

(*g*) Ersk. i. 7, 17.

who were unsecured, threatening to lead adjudications against the estate (*a*). In the authoritative case of *Somerville*, in which the opinion of the whole judges was taken, a similar state of facts occurred, and the unanimous opinion of the consulted judges was, 'that the prayer of this application may be, and ought to be granted, as absolutely necessary to save the estate of the pupils from being torn to pieces by the diligence of creditors, one of whom has already taken steps preparatory to leading an adjudication, and which would have the necessary effect of forcing other creditors to adopt similar measures' (*b*). These cases were followed by one in which a tutor-at-law obtained authority to borrow money on the security of the pupil's heritage for the purpose of executing repairs on the property, and paying certain outstanding claims for the pupil's education, and law expenses. The circumstances of the case were thus not so clamant, but the Lord Justice-Clerk (Boyle) observed: 'Upon referring to recent cases and the practice of the First Division, I do not think we would be justified in refusing this petition, though in this Division we are more chary of granting extraordinary powers' (*c*). In the case of *Bellamy*, the circumstances again were those of urgent necessity, the estate being heavily burdened with debt; and the Court granted the power to tutors-nominate, the Lord President (M'Neill) observing: 'The main question is, whether the Court ought to interfere at all; or whether this is not in the power of the parties themselves. As to the expediency of what is proposed to be done, we have no doubt. It certainly would be inequitable to make the parties who have become creditors under these obligations wait till the children become *sui juris*, or to compel them to take expensive proceedings in the shape of adjudications. Looking at the cases which have occurred, and especially at the case of *Crawford*, coming as it did after the case of *Somerville*, which is a case in point, I see no incompetency in granting this application' (*d*). In a case which occurred soon after, where authority to borrow was refused, the necessity does not appear to have been very clamant. The applicant was

(*a*) *Wilson*, 7 July 1835, 13 S. 1046.

(*b*) *Somerville's Factor*, 6 Feb. 1836, 14 S. 451.

(*c*) *Crawford*, 6 July 1839, 1 D. 1183.

(*d*) *Bellamy and Others*, 30 Nov. 1854, 17 D. 115.

the father of the pupil, and the pupil was within a year of puberty. The Lord President, however, was disposed to grant power to borrow. 'Having granted similar authority in one or two cases, and recently in the case of *Bellamy*, which is as like this as can be, I see no expediency in stopping short, and refusing the powers now asked for. This particular case differs from the case of *Bellamy* in respect the father is administrator of the pupil. I am not sure that that makes much difference, if we see to the safety of the party, that is, that we see that the money is properly applied.' The case having been delayed for further consideration, his Lordship observed: 'I stated the grounds of my opinion when the case was formerly before us. I was of opinion that it was ruled by the precedents of *Somerville*, *Crawford*, and *Bellamy*, and that we cannot go back on these cases. I see no reason for differing from these cases.' The other judges, Lord Deas and Lord Ivory, differed in opinion, and the application was refused. Lord Deas observed: 'A power to borrow is one which the Court have always been very chary of granting even to *curators bonis* and factors *loco tutoris*, who are their own officers. Power to borrow was granted to a factor *loco tutoris* by an authoritative judgment in *Somerville's* case.' 'In the case of *Crawford*, the Second Division authorized a tutor-dative to borrow on heritable security.' 'But a tutor-dative, like a *curator bonis* and a factor *loco tutoris*, finds caution, and that makes a great difference.' 'But the position of a tutor-nominate, or of a father acting as administrator-in-law to his children, is totally different. He finds no caution, neither does he come under the operation of the Pupils' Protection Act. If we confer upon him a power, which may result in the conversion of the pupil's heritage into money, we enable him to put the money in his pocket, and leave the pupil without redress. Or if there be redress to the pupil, by taking back the heritage from the purchaser, we mislead innocent third parties by apparently granting an authority which is no authority at all.' Lord Ivory observed: 'I think with Lord Deas, that if this bond be granted with a power of sale inserted, we will enable the creditors to dispose of the whole estate which was made the subject of the security; and if we have no means of recalling that estate into the hands of the Court, and if we see that the difficulty of administration only reaches over a short period, it

certainly is a consideration, whether we should not require such a statement of the necessity for this proceeding as would compel us to grant the power at present. If there be such present and urgent necessity,—if there be creditors entitled instantly to proceed against the estate, and if it would be torn to pieces to the prejudice of the pupil by each creditor leading an adjudication,—then I should be less indisposed to grant it. But I do not at present see that there is that statement of an urgent necessity' (*a*). These are the grounds on which the Court proceed in granting such power.

Bond by tutor upheld if there be no lesion thereby to minor.

Should the tutor grant a security over the estate, it is thought that if there be no lesion, and the money has been properly applied for the minor's use, the bond will be upheld, just as it is thought a sale in the same circumstances would be (*b*).

Letting the pupil's estate.

IX. It is the duty of the tutor to take care that the pupil's estate shall be duly let out in lease to competent tenants (*c*); but no lease can be granted by a tutor for a longer period than his own tenure of office (*d*), and this whether the administration be brought to a close by his death, or by that of the pupil,—by his removal from office, his resignation, or by the arrival of the pupil at puberty (*e*). As factors *loco tutoris*, by the Act of Sederunt, are allowed to grant leases for a year after the expiry of their office, so Bankton thought (*f*) that the leases of tutors would subsist for the same period; but the opinion has not been sanctioned by any other writer. In one case (*g*), where the tutors were removed as suspect, the Court declared that the lease granted should terminate at the ensuing Whitsunday. Should the tutor grant the lease for a longer period than his own administration, the pupil, on becom-

(*a*) *White*, 7 March 1855, 17 D. 599. As regards trustees, the rule is, that if the trust deed does not contain power to borrow, the Court will not confer it. *Ker*, 2 March 1855, 17 D. 565; *Kinloch*, 7 Dec. 1859, 22 D. 174.

(*b*) See the authorities just cited; and *Morton* v. *Muirhead*, M. 8931 (1749); *Armour* v. *Lands*, M. 16284 (1671); *Halliday* v. *Winderam*, 2 Sup. 106 (1687); *M'Millan* v. *Armstrong*, 6 Dec. 1848, 11 D. 191.

(*c*) Ersk. i. 7, 24, *in fin.*

(*d*) *Reay* v. *Anderson*, M. 16385 (1800); *Ross* v. *Ross*, 9 March 1820, F. C.

(*e*) Same authorities. Hunter on Landlord and Tenant, vol. i. p. 159; *Lothian* v. *Somerville*, M. 16337, last clause of interlocutor (1724); 1 Bell on Leases, p. 133.

(*f*) Bankt. ii. 9, 18.

(*g*) *Lothian*, *supra*.

ing *sui juris*, may at once enter into possession by a process of removing without reduction (*a*).

Inexpediency of rule preventing tutor granting definite leases.

The inexpediency of the rule, which prevents a tutor granting a lease for a longer period than the endurance of his office, has been strongly insisted upon by the whole series of later writers (*b*). It has been thought so great, that it is said the Court are warranted in setting aside, in this instance, the general principle of law, that no temporary administrator of property can grant a right over it, for a longer period than the duration of his own administration. The hardship of the general rule is, however, in a great measure taken away by the practice now generally adopted, of applying to the Court of Session,—either by a regular action, which was at first thought to be the only competent way (*c*), or, which is now the usual practice, by summary petition,—to authorize the tutor to grant a lease of such a duration as to induce a tenant to embark his capital in the speculation (*d*).

Powers granted by Court to give lease for a definite term.

The Pupils' Protection Act sanctions the granting of leases by tutors, under the authority of the Court, for a period beyond the endurance of their office (*e*). Leases of agricultural subjects have frequently been authorized for the period of nineteen years (*f*); and in one case authority was granted to the tutors of a pupil heir of entail to let minerals for a period of thirty-one years, and waterfalls for twenty-one years (*g*). Doubts were at one time entertained by the Second Division of the propriety of conferring powers of long leasing upon tutors, who are not officers of Court (*h*).

(*a*) Ersk. i. 7, 16. *A.* v. *Huntly*, M. 16285 (1672).

(*b*) 1 Bell, Com. 133-4; Ivory's Ersk. Note 208 to i. 7, 16; Bell on Leases, vol. i. p. 133; Hunter's Landlord and Tenant, vol. i. p. 160; Macallan's Ersk., Note to Ersk. i. 7, 16.

(*c*) *Colt* v. *Colt* (1800), M. 16387, and another case on same page of Morrison; also *Beatson*, 24 Feb. 1810, F. C.

(*d*) See *infra*, Part v.; 1 Bell, Com. 133. *Armour* v *Lands*, M. 16284 (1671); *Forbes* or *Carnegie*, 22 Dec. 1838, 1 D. 355; *Brown*, 11 Dec. 1846, 9 D. 250; *Speirs' Tutors*, 11 July 1848, 10 D. 1474; *Speirs*, 23 Dec. 1854, 17 D. 289, and cases *infra*.

(*e*) 12 and 13 Vict. c. 51, s. 7.

(*f*) *Forbes* or *Carnegie*, *supra*; *Brown*, *supra*; *Halkett*, 24 Nov. 1847, 10 D. 146; *Speirs' Tutors*, *supra*; *Morison's Tutors*, 20 Feb. 1857, 19 D. 493, and 19 July 1861, 23 D. 1313.

(*g*) *Speirs' Tutors*, *supra*. In *Waddell*, 19 Feb. 1851, 13 D. 739, the Lord Justice-Clerk thought that this must have been passed in the hurry at the close of a session.

(*h*) *Waddell*, *supra*; *Fraser*, 9 June 1857, 19 D. 801.

But these were not participated in by the other Division (*a*); and the matter has finally been set at rest by a recent case decided in the First Division, after consultation with the judges of the Second Division, where such powers were granted. 'The judges were all of opinion that it was competent for the Court to interpose, that it was right the Court should interpose, and that the power of tutors-nominate, with the authority of the Court, to grant leases of ordinary administration—not grants of feus or extreme long leases, but leases of administration—was a competent exercise of authority' (*b*).

Can tutor let at a decreased rent?

To prevent frauds against the pupil, the strict rule of law is, that the tutor cannot let the property at a lower rent than what it brought at the death of the pupil's predecessor (*c*); and if this rent cannot be obtained, the subject ought to be exposed to let by public auction (*d*). In modern times this latter practice has gone into desuetude, and the mode generally adopted is, to make an application to the Court, stating the circumstance that the former rent cannot be obtained for the property, and requesting their sanction to a lease at a lower rent (*e*). Even this does not appear to be thought necessary; it has been said, that the tutor may, of his own accord, let the property at the best rent he can obtain for it, even though this should be smaller than formerly (*f*).

Abatements of rents granted by tutors.

Tutors may grant abatements of rent without the authority of the Court, in cases where the distressed state of agriculture, etc., in the country sanctions it, and where it is generally done. Where any extraordinary or unusual event brings a loss upon tenants, and makes it impossible for them, without ruin, to pay the full rent of a particular year, there is no alternative but either to give them an abatement, or to roup them out and remove them. Choosing

(*a*) *Kincaid*, 5 July 1856, 18 D. 1208; *Morison's Tutors*, 20 Feb. 1857, *supra*.

(*b*) *Per* Lord President M'Neill in *Morison's Tutors*, 19 July 1861, 23 D. 1313.

(*c*) Bell, Prin. 2084; Ersk. i. 7, 16; Craig ii. 10, 1; Hunter, vol. i. p. 160. *Cumming*, 4 Sup. 459 (1699). In this case, an application was made to the Court for warrant to let by public roup.

(*d*) Ersk. i. 7, 16. *Tutor of Colzean* v. *Nearest of Kin*, M. 14282 and 16282 (1670); and authorities *infra*, in treating of the extraordinary powers given by the Court, Part v.

(*e*) Authorities *infra*, Part v. Tutors-at-law and tutors-dative apply to the Court through a report by the accountant. 12 and 13 Vict. c. 51, s. 7.

(*f*) Wall. Prin. p. 326. *Drummelzier* v. *Tweeddale*, M. 16300 (1680), and cases reported in *Drummelzier*.

between these two alternatives, is, in the proprietor himself, a matter of feeling as well as of prudence; in administrators, a matter of prudence only; and that it is in the general case better to wipe off old arrears, and not discourage tenants from making improvements, is a position which has received the sanction of the Court. Abatements of this kind will be sustained or rejected according as they have been warranted or not by a rational expediency (*a*). It is *ultra vires* of the tutor to take grassums, or anticipations of rent, without obtaining the authority of the Court (*b*). Rental rights cannot be originally granted by them, though they may be renewed, if already granted (*c*).

Leases held by pupils.

Where the pupil is tenant of a subject, the lease of which expires during the tutor's administration, it would seem that he is bound to get a renewal of it, if the subject be not of a precarious and uncertain nature (such as the collection of the duties payable by vessels for a lighthouse), and if the subject be let at the same, or at least a slightly increased rent (*d*). A tutor for a pupil tenant, if he accept the office (*e*), must manage the farm, either personally or by deputy. In such cases, however, it is common, on account of the great trouble connected with duties of this kind, to obtain the consent of the Court to a renunciation of the lease, the landlord being willing to accept it (*f*). Where it evidently appears to be for the interest of the pupil to renounce the lease, the Court will, after due inquiry, interpone their authority to such a measure (*g*).

Exercise of right of patronage.

X. The tutor is entitled to exercise a right of patronage

(*a*) *Annand* v. *Grant*, 7 March 1817, F. C.; *Oxford* v. *His Curators*, M. 16305 (1684); *Drummelzier* v. *Tweeddale*, M. 16300 (1680); Arg. in *Graham* v. *Hopeton*, M. 5599 (1798); *Colzean's Tutor* v. *Nearest of Kin*, M. 16282 (1670).

(*b*) Hunter, vol. i. p. 160.

(*c*) Bankt. ii. 9, 41.

(*d*) Opinion of Court in *Parkhill* v. *Chalmers*, M. 16365, affirmed on appeal (1776); and arg. in *Montgomerie* v. *Wauchope*, 4 June 1822, see Session Papers. But the point in neither of the cases referred to was absolutely decided. See *Wilson* v. *Wilson*, stated *infra*, p. 287.

(*e*) *Wilson*, *ibid.*

(*f*) *Infra*, Part v., and *infra*, p. 266. See *Forman's Tutors* (1805), Hume 888, where the Court refused to interfere; and *Blyth* v. *Craig* (1808), Hume 889, where the Court sanctioned a renunciation of a lease, the transaction being equivalent to a subset to the landlord.

(*g*) *Cockburn's Tutors* v. *Cockburn*, 10 March 1825, 3 S. 642; *Brown*, 11 Dec. 1846, 9 D. 250; *Turner*, 1 March 1862, 24 D. 694.

belonging to his ward, and he neglects his duty by omitting to do so (*a*).

Cannot alter succession.

XI. The tutorial office being one merely of administration, it gives the tutor no power to regulate the succession to the pupil's property after the latter's death. The operations of that officer upon the estate must be limited to the single and exclusive object of his appointment, namely, its security and preservation. There are various modes of altering the succession, which may, however, be all reduced to two classes,—direct and indirect.

Direct alterations of the succession.

(1.) A tutor is expressly debarred from making, upon subsisting destinations, *direct* alterations, which have no other end in view but to alter them; such as changing a bond destined to executors, to one of the same nature secluding them; or, on the other hand, a bond by which executors were secluded, into one by which they were admitted (*b*). In like manner, the tutor has no power of making *substitutions*, in the destination of the minor's rights, either in favour of himself, which would also be struck at by the rule, *In rem suam tutor fieri non potest auctor* (*c*), or in favour of third parties, not the heirs-at-law (*d*). The doctrine was settled in a case peculiarly favourable for the substitution. A father, as administrator-in-law for his idiot son, an infant, substituted a third party to the son, in his right to his mother's share of the goods in communion; but the Court held, that even in this case the next of kin of the pupil were preferable to the substitute (*e*). In a late case the same principle was recognised, that it is incompetent for a father, as tutor, to do anything in regard to the rights or property of his lunatic son, by which a burden would be imposed upon his executor instead of his heir, upon whom the law would have placed it; and it was found, that those who were contingently interested, had a right to interfere to prevent any

(*a*) Connel on Parishes, pp. 520 and 521; Bell, Prin. s. 836; More's Notes, p. xliii.; Dunlop's Parochial Law, p. 221, No. 99. See *Brown* v. *Johnston*, 9 June 1830, 8 S. 899, as to a minor and curators presenting to a church.

(*b*) Ersk. i. 7, 18. *Reid* v. *Berkley*, M. 16312 (1688); see also interlocutor of Court in *Stevenson* v. *Fife*, Robertson's Appeals, p. 216, M. 14852 (1718); *Wauchope* v. *Wauchope*, Elch. *v.* Minor 6, aff. 1 Cr. and Stew. 200 (1738); *Sharp* v. *Crichton*, M. 16285 (1671); Bankt. i. 7, 29.

(*c*) *Tennent* v. *Tennent*, M. 16288 (1673).

(*d*) See *Stevenson* v. *Fife*, Robertson's Appeals, p. 216, and M. 14852 (1718).

(*e*) *Morton* v. *Young*, 11 Feb. 1813, F. C.

such acts, unless they could be shown to be for the lunatic's interest (*a*). A tutor cannot change heritable into moveable, even to enable his ward himself to regulate his succession by a testament on his arriving at puberty; a minor not being entitled to make a settlement of his heritage (*b*).

Alterations of succession effected through the operation of public law.

It often happens, in the management of the pupil's property, that its nature of heritable or moveable is altered, without any sinister intention on the part of the tutor, of affecting the succession. It is generally agreed, that acts of the tutor, which are done solely because they appeared to him reasonable and expedient, do not change the succession, though the nature of the subject be altered from moveable to heritable, or the reverse; but that in all cases, where the result happens by the operation of a public law, or by the diligence of creditors, or from any other cause over which the tutor has no control, the succession must be regulated according to the character of the property in the state in which these changes have left it (*c*).

Where the tutor changes the nature of property with a view to its greater security.

In the first class of cases may be ranked all those in which the tutor adopts reasonable means for obtaining additional security for his pupil, but which in themselves are acts which he has it in his power to do or not. Such are purchases of land made with the pupil's money, heritable securities obtained for a personal debt, or sums of money lent out, or adjudications led against a debtor's estate. Though thus rendered heritable, the property acquired passes to the pupil's executor (*d*).

Investments by tutor in heritage may go to pupil's executor.

In an important case relating to an entailed estate, it was held that savings from the income during the pupillarity amounting to £65,000, and which had been invested by the tutors partly in heritable bonds and partly in the purchase of superiorities over land, went to the executor and not to the heir. A further question was then raised in the Court of Exchequer, whether these accumulations were liable, as personal estate, to inventory duty; and it was

(*a*) *Strathallan* v. *Glenlyon's Trustees*, 23 May 1837, 15 S. 971, and 21 May 1840.

(*b*) Ersk. i. 7, 18; *Sharp* v. *Crichton*, M. 16285 (1671).

(*c*) See *Kennedy* or *Hannay* v. *Kennedy*, 10 Nov. 1843, 6 D. 40.

(*d*) 1 Bell Com. 133, and 2 Bell Com. 7; *Ross* v. *Ross*, M. 5545 (1793); *A.* v. *B.*, M. 16312 (1688); *Sharp* v. *Crichton*, M. 16285 (1671); *Reid* v. *Berkley*, M. 16312 (1688); *Graham* v. *Hopeton*, M. 5599, No. 3 and No. 4 (1798).

held that they were. Lord Ivory observed: 'The estate on which duty is here claimed, is identical in all questions of succession with what it would have been if there had been no attempt by the tutors to convert it into real estate. It is taken as intestate succession by the executrix, in her character of executrix, and taken as moveable estate distinct from heritable estate. It is taken *ex bonis*, not *ex hæreditate*, of the deceased. The title is, that she is executrix, not service, which, if the estate were heritage, would have been required. Had the executrix died before conversion, *ex animo suo*, her executor would have taken, not her heir. So long as there was no election, *no animus* of converting from moveable, shown on her part, it would have continued moveable, and her executor would take. It never would have been dealt with as heritable.' His Lordship further observed: 'I next come to consider what is the effect of the conversion by the tutor. His powers are merely powers of administration; he has no power to alter the succession. This is an absolute rule, and not dependent on the fact, whether the pupil has received prejudice from the conversion; because, although the pupil's interest were benefited, the succession would not be changed. The tutor has no power by his voluntary conversion to alter the succession. I hold this to be the leading principle, that the tutor has not legally power to change the succession. For, even if the pupil's estate were doubled, the pupil might object to the restraint which absolute conversion would have imposed upon his power of making a testament. The testament of the minor would carry such estate; and if he made no testament, it goes to his executor *ab intestato*. If the minor had tested, his executor-nominate would in all respects have been *in eodem* with an executor *ab intestato*, except as to form of title. Although converted by the tutor to the pupil's gain, it makes no difference; the pupil's estate remains unaltered as to succession. The estate acquired is a *surrogatum*' (*a*). Effect was given to the same principle in a more recent case, where the curator of a lunatic proprietor of an estate, entailed in terms which gave the possessor of it the powers of a fee-simple proprietor, having borrowed on the security of the estate, and under authority of the Court, money to pay off considerable personal debts of his ward, it was held

(*a*) *Adv.-Gen.* v. *Anstruther*, 5 July 1842, reported under date 23 Dec. 1850, 13 D. 450.

that the transaction being in its nature one for temporary convenience, could not affect the succession by converting moveable debts into heritable; and therefore, that the heir in heritage was entitled to relief of the burden on the heritage out of the executry funds (*a*).

As this rule is based on the principle, that it would be unjust to allow the tutor to make a will for the pupil, it is thought that with regard to all other matters (*b*), the property so altered in character, would be regulated in its modes of transmission and attachment according to its altered nature. Adjudication, therefore, would be the proper diligence for attaching an heritable security, obtained by the tutor for a moveable debt (*c*). In like manner, when the pupil's moveable estate is thus changed to heritage, his executors could not directly take it up merely because it was once moveable. They can only obtain right by compelling the heir to denude in their favour (*d*).

Alterations made without the tutor's consent, through the proceedings of third parties.

With regard to the second class of alterations, one of the judges, in *Ross* v. *Ross* (*e*), 'wished to make a distinction between the *voluntary* and *necessary* acts of a tutor, and to consider the latter as having in all respects the same effect with those of the proprietor himself. But it was suggested, that this would leave the matter on too loose a footing, and involve parties in a proof of the necessity of altering the security in every particular question.' The inconvenience thus anticipated did not seem to the Court to be so great in the next case which occurred; and in which they settled the distinction between voluntary and reasonable, or expedient acts, on the one hand, and those which are done without any discretionary power on the part of the tutor to stop them, on the other. On the latter ground, the price of teinds belonging to the pupil, sold by decree of the Court on an action at the instance of the heritors, was found to belong to the executors, because the subject was rendered moveable by the operation of a general law; and it was maintained successfully, that a change effected in this manner on the nature of the property is very different from one brought

(*a*) *Moncrieff* v. *Miln*, 16 July 1856, 18 D. 1286.

(*b*) See, for a limitation as to this, the above case of *Anstruther*.

(*c*) 2 Bell, Com. p. 7.

(*d*) See Session Papers in *Graham* v. *Hopeton*, *ibid.*

(*e*) *Ross* v. *Ross* (1793), M. 5545.

about by the voluntary act of the tutor, and must have the ordinary effect of altering the succession by its changing the nature of the property (*a*). In the same case another question was determined, after a hearing in presence, which shows more clearly the distinction between the two classes. The tutor paid from the executry funds upwards of £36,000 of heritable debts, for which he took discharges from the creditors, who had, before payment, adopted legal measures for enforcing payment. The executor demanded from the heir the money so expended, on the ground that the tutor had no right thus to apply executry funds, and so alter the succession, or, at least, that instead of discharges, he ought to have taken assignations, and so kept up the debts against the estate. But the Court preferred the heir. It was observed on the bench, 'that intestate succession is, in general, governed by the state of the property at the defunct's death. The rule indeed admits of exceptions, as in the case of an heritable bond, or adjudication obtained by a tutor; but in the present case the pursuers seek to revive and redintegrate debts, which do not exist, in order that they may succeed to funds which have been most properly applied by the tutor to relieve the estate of the proprietor, without any sinister view to his succession. There was no equity between the executors and the heir which could have this effect. In so urgent an act of administration, the tutor was bound to consult the interest of the proprietor alone, without attending to eventual consequences.' This branch of the *Annandale* case has been thus referred to (*b*): 'That act of the tutor did alter the succession. It was held to be clearly the province and duty of the tutor to pay heritable debts affecting the pupil's estate; and this act was held available to alter the succession. But the other acts of the tutor, which were of a discretionary kind, were not held available in the question of succession.' In a later case (*c*), however, where the same point arose incidentally, one judge thought this branch of the *Annandale* case had been wrongly decided, and Lord Ivory merely observed, that 'the Court,

(*a*) *Graham* v. *Hopeton*, M. 5599 (1798). More's Notes, p. xxxviii.

(*b*) *Per* Lord Ivory in *Adv.-Gen.* v. *Anstruther*, *supra*.

(*c*) *Moncrieff* v. *Miln*, *supra*. The proper question here was, whether money borrowed on the heritage to pay off personal debts converted these into heritable debts; and it was held that it did not, the act being one merely of temporary convenience.

right or wrong, proceeded on the footing, that there was a proper act of administration, and there no longer remained any debt at all.' In a case decided about the same time, which underwent elaborate discussion, and where it was decided that the tutor of a pupil heir of entail is entitled to apply consigned money in repayment of outlay for permanent improvement on the estate, it was assumed, that had the estate been a fee-simple estate, the compulsory sale of part of it to the railway company would have altered the succession, and thrown the price into the executry. 'When a part of the property of a fee-simple proprietor in pupillarity is carried away from him by the act of the law, for a price or consideration, the latter is not held to any effect as a *surrogatum* for the former. The succession of the pupil is changed in regard to the property. Thus the price of teinds belonging to a pupil which are bought from him by the heritors, under the Act of Parliament, goes to his executor, and not to his heir. In like manner, had this been a fee-simple estate, the consigned money would, on the death of the pupil, have gone to his executor' (*a*).

How far rule preventing tutor altering succession ought to be extended.

The rule that a tutor cannot, either directly or indirectly, alter the succession to his pupil's property, is one which, if judaically applied, would give rise to very absurd consequences. A tutor, for example, who, by conducting a law-suit out of the personal funds, obtains by a decree an estate to the minor, virtually makes these moveable funds heritable.—Is the estate, therefore, to go to the executor; or will he have a personal claim against the heir for the expense? If he erects farm-steadings, the same is the consequence. The steadings cannot go to the executor, and must he have a claim for the expense laid out upon them? If a coal mine is discovered, and set agoing at a considerable expense, Is the same consequence to follow?

Where debtor voluntarily pays an heritable bond.

Under this head might also be classed the case where a debtor of the pupil insists on paying an heritable debt, thenceforward changed to moveable. It has not yet been decided whether the money so paid, would fall to the pupil's heir or executor. There can be no doubt, if the tutor himself uplifted it, without being compelled by the debtor to receive payment, that this act would not alter the succession from heir to executor.

(*a*) *Per* Lord Benholme in *Stuart*, 10 Feb. 1855, 17 D. 380.

What guardians are prohibited to alter the succession?

The foregoing rules apply equally to a factor *loco tutoris* (*a*), to a *curator bonis* (*b*), to a father as administrator-in-law (*c*), as to an ordinary tutor.

Powers of the tutor with regard to acts of a speculating character, attended with risk.

XII. The tutor cannot enter into any speculations on behalf of his ward which are attended with hazard, however promising of success they may be (*d*). The cases which may arise on this subject may be divided into two classes: the *first*, schemes in which the tutor is compelled in some measure to embark, *pro damno vitando;* and the *other*, where the entering into the transaction is entirely a matter of free will on the tutor's part, *pro lucro captando.*

Of the former class are those cases, where the pupil's father has been engaged in a course of speculations which cannot be immediately wound up without loss, and which can only be kept from producing detriment to the pupil by carrying them on at great hazard. Where, for example, an extensive manufacturer dies, it may be impossible to close up his mills, and dispose of the whole apparatus of manufacturing industry, except at heavy loss, and where, therefore, it would be the most expedient course for the minor to continue the concern in operation. In such cases, the tutor must exercise his own discretion, for the Court will not interfere by way of sanctioning any particular procedure (*e*). These are, in all cases, questions of circumstances; but this principle may be laid down, that if the business of the father, inherited by the son, be not a steady business, in which there is no approximation to gambling; if it be one in which, though the profits be large, the hazard corresponds, as in the business of insurance; it is the duty of the tutor to discontinue it (*f*). 'There is, however, no rule requiring a tutor to sacrifice the estate by immediate realization. Take this very case: The estate, to the value of more than £150,000, consisted of shares in joint-stock iron and other companies, which could not have been thrown at once into the market

(*a*) *Ross* v. *Ross*, M. 5545 (1793).

(*b*) *Kennedy* or *Hannay* v. *Kennedy*, 10 Nov. 1843, 6 D. 40.

(*c*) *Morton* v. *Young*, 11 Feb. 1813, F. C.

(*d*) Bankt. i. 7, 36.

(*e*) Bankt. i. 7, 36; Warnkönig, Com. vol. iii. p. 175. But see *infra*, Part v.

(*f*) See *Plummer* v. *Tutors*, M. 16358 (1757); *Philip*, 22 Nov. 1827, 6 S. 103; *Cochrane* v. *Black*, 1 Feb. 1855, 17 D. 337, and 16 July 1857, 19 D. 1019.

and disposed of except at enormous sacrifice. Would the tutor have been justified in doing that? In my opinion, to have done so, would have been violating and not performing his duty. By taking a different course, there was great gain in place of great loss in all this large estate, except the bank shares. The course followed was not speculation, but prudent winding up. That the estate was in its nature speculative, was the deceased's act and not the tutor's. I should be slow to sanction the doctrine, that either tutors or trustees can under no circumstances retain even permanently investments made by the deceased, which they would not have been themselves justified in making' (*a*).

But if, on the other hand, the tutor give up a profitable business, which cannot otherwise be disposed of, it would seem that he will be liable to the pupil for the loss thereby sustained (*b*). It has been decided in England, that the executor of a deceased partner, *continuing* the concern for his child, a pupil, by *inter alia* signing bills, is liable upon them personally, as taking upon himself the debt, by professing to act for a party who could not be responsible (*c*). Nay, the propriety and legality of continuing the concern, even in the ordinary business of an established flesher, has been called in question (*d*). To escape the difficulties which beset tutors in these cases, it is common to apply to the Court for liberty to sell or give up the business (*e*).

Where tutor voluntarily speculates to secure profits.

Of the second class of cases, where, tempted by some large return, the tutor enters into (not *continues*) hazardous schemes with his pupil's means, he must himself bear the consequence of an unfortunate issue. 'When a tutor employs the pupil's money in a speculative trade or hazardous operation, carried on in name of the pupil, he commits a wrongful act; and while any profits which are reaped will come to the pupil's estate, the whole risk of loss lies with the tutor. This is the rule when the tutor acts in

(*a*) *Per* Lord Deas in *Acct. of Court* v. *Baird*, 29 June 1858, 20 D. 1184.

(*b*) Stair i. 6, 18; Dig. xxvi. 7, l. 5, s. 9; l. 47, s. 6; l. 58, Pr.; Warnkönig, vol. iii. p. 175.

(*c*) *Wightman* v. *Townroe and Others*, 1 M. and S. 412. It has been suggested that this rule would be followed in Scotland. Thomson on Bills, 1st ed., p. 241.

(*d*) *Per* Lord Newton in *M'Farlane* v. *Burgess*, 27 May 1828, 6 S. 855. See the rule in the Roman law on this subject, which is extremely equitable, 3 Warnkönig, Com. p. 175.

(*e*) *Infra*, Part v.

name of the pupil; but *a fortiori* must the rule hold when the pupil's money is employed by the tutor in his own name, and for his own purposes, or with a view to his own gain' (*a*). As illustrations of this, money expended in searching for lead mines would not be allowed, even though the appearances of lead, in the opinion of persons of skill, were promising (*b*). And the tutor would not be entitled to employ the pupil's money in promoting the supposed political interests of the latter's family (*c*), nor to *commence* trading with it (*d*), nor to enter the *pupil* as a partner of any company; and if the tutor do so, he will himself be personally liable (*e*). If the tutor himself enter *qua* tutor into partnership in any trade or company, he will be personally liable not only for partnership debts to third parties, but also to contribute *inter socios* his proportion to pay off the partnership debts (*f*). But if a minor *pubes* be made a partner with consent of his curators, the father or other guardian would not be liable in the obligations of the partnership; the transaction would then be regarded as a proper mode of establishing him in the world (*g*).

A tutor has no power to embark his pupil's funds in a new lease (*h*); and in general, wherever the speculation is hazardous and uncertain, it is a transaction which will not be regarded as justifiable on the part of the tutor (*i*).

Appointment of factors.

XIII. As the office of tutory is gratuitous, it would often be a source of hardship, were the tutor compelled to superintend personally the, it might be, extensive affairs of his ward. Hence he has been allowed to manage the tutorial business by a factor with

(*a*) *Per* Lord Cowan in *Cochrane* v. *Black*, 1 Feb. 1855, 17 D. 337.

(*b*) *Graham* v. *Hopeton*, M. 5599 (1798).

(*c*) *Ibid.*

(*d*) Bankt. i. 7, 36; see Stair i. 6, 18.

(*e*) *Calder* v. *Downie*, 11 Dec. 1811, F. C., affd.; *Pettigrew Wilson* v. *M'Aulay*, 15 Feb. 1803, cited in *Calder*, *ibid.* 2 Bell's Com. 624; Bell's Prin. 2084; Thomson on Bills, 1st ed., 241.

(*f*) *Lumsden* v. *Buchanan*, 22 June 1865, House of Lords.

(*g*) *Duncanson* v. *Duncanson*, M. 16336 and 8928 (1715). Ersk. i. 7, 24.

(*h*) *Supra*, p. 259, foot.

(*i*) See the interesting case of *Murray of Blackbarony*, on which the opinions of the Dutch civilians were taken. Not specifically reported; but see reference to it in *Aikenhead* v. *Aikenhead*, M. 16331 and 977 (1711); and in Stair i. 6, 36, and in Bruce, p. 345. The celebrated commentator John Voet gave an opinion in this case, which he has inserted in his works. Voet, Com. ad D. de adminis. et peric. tut. s. 13.

a salary (*a*); for whose actings he is responsible, unless the factor's circumstances have been such as precluded all suspicion of his solvency, and that he failed in a manner so sudden as to prevent the tutor withdrawing the pupil's funds from his hands (*b*). Where, however, there has been gross neglect on the tutor's part in supervising such factor, he renders himself responsible for his intromissions (*c*). As to the factor's powers, it has been held that his possession of a promissory-note in favour of the minor and his curator, although he has been in use to receive and discharge the interest, does not imply a power to uplift the principal (*d*). In one case, where a curator employed his own agent to manage the pupil's affairs, and had not called him to account for eleven years, he was found liable for the agent's defalcations (*e*). Slighter neglect, however, would not be sufficient to render the tutor liable for failure in diligence on the part of the factor (*f*). Erskine suggests that the factor should be made to find caution (*g*); but the omission to exact this does not render the tutors personally liable on the factor's bankruptcy (*h*). It was once found that the factor could only be compelled to account to his own employer, the tutor (*i*); but Stair and Bankton hold that the factor, as well as the tutor, may be sued by the pupil, on his arriving at full age, to render an account of intromissions (*k*). The salary to the factor must be moderate; and if not so, the tutor will not receive credit for the excess in the accounting with his ward (*l*). Trustees are entitled to employ an agent, and are not bound to transact trust business personally and

(*a*) Ersk. i. 7, 16, *ad fin.*; Stair i. 6, 13; Bankt. i. 7, 20; 1 Domat, p. 279, No. iii.

(*b*) Stair i. 6, 13; Bankt. *ibid.*; *Edmiston* v. *Edmiston*, M. 16264 (1635); *Home* v. *Pringle*, *ut infra*, as in (*h*), and *Thomson* v. *Campbell* as in (*h*).

(*c*) *Haddoway* v. *Milligan*, 9 March 1802, not reported, but see Hume, Sess. Papers. See also *Sim* v. *Charles*, 13 May 1830, 8 S. 741, and Fac. Coll.

(*d*) *Clyde Trs.* v. *Duncan and Cochrane*, H. L., 17 May 1853, 2 Stuart, H. L., 57.

(*e*) *Sutherland* v. *M'Kenzie*, 20 June 1815, not reported.

(*f*) See interlo. of Lord Ordinary in *Anderson* v. *Cameron*, 12 Nov. 1844, 7 D. 92; More's Notes, xxxviii. xxxix., and *Home* v. *Pringle*, *infra*.

(*g*) Ersk. i. 7, 16.

(*h*) *Home* v. *Pringle*, 30 Nov. 1837, affd. 22 June 1841, 2 Rob. 384; *Thomson* v. *Campbell*, 16 Feb. 1838, 16 S. 560.

(*i*) *Home* v. *Home*, M. 514, 1 Sup. 320 (1631).

(*k*) Stair i. 6, 13; Bankt. i. 7, 20.

(*l*) Part of the Annandale case unreported, *Graham* v. *Hopeton*, M. 5599 (1798); see Sess. Papers.

gratuitously (*a*). Where it is necessary for the expiscation of the meaning of the trust deed, trustees are entitled to apply to the Court for directions (*b*).

Can one of a number of tutors be appointed factor?

It was once laid down as law, that if there be a number of tutors, one of them may be appointed factor with a salary (*c*). The soundness of the law thus sanctioned having been called in question by Lord Cottenham, in the case of *Home* v. *Pringle* (*d*), the Court, in various subsequent cases (*e*), refused to sanction such a claim by one of several co-trustees as contrary to the law of Scotland; and it may now be laid down, that if a tutor be appointed factor, he can claim no remuneration for his own services, and will only be allowed his outlays. In order to avoid this rule, which is sometimes inconvenient, it is the practice now to insert an express clause in the deed of appointment of tutors and trustees, allowing them to appoint one of their own number as a factor, with a salary.

How the tutors sue and are sued.

XIV. The mode in which tutors sue, and are sued, on behalf of their pupils, falls now to be considered.

Title to sue.

(1.) A pupil has no *persona standi in judicio* (*f*). When he has tutors (the case now to be considered), *they* are the parties who must represent him in a court of law. Actions are raised in name of the tutors alone, *qua* such; and it would be incorrect to libel the pupil as a pursuer, or to institute the action with his consent,

(*a*) *Peddie* v. *Beveridge*, 7 Feb. 1860, 22 D. 707; *Hay* v. *Binney*, 19 Feb. 1861, 23 D. 594. It is, moreover, the universal practice. Where, however, there are trust agents, one of the trustees is not entitled to employ another agent at the expense of the trust—*Ramsay's Trs.* v. *Souter*, 18 Dec. 1863, 2 Macph. 343; and a trustee for creditors is not entitled to employ a law agent to do business which it was his duty personally to perform—*Wilson's Trs.* v. *Wilson's Crs.*, 4 Nov. 1863, 2 Macph. 9.

(*b*) *Shepherd and Grant* v. *Hutton's Trs.*, 24 Feb. 1855, 17 D. 516. See *Clyne's Trs.* v. *Clyne*, 17 June 1848, 10 D. 1325; *Fowlis* v. *Fowlis*, 3 Feb. 1857, 19 D. 362; *Moncrieff* v. *Menzies*, 25 Nov. 1857, 20 D. 94.

(*c*) *Montgomerie* v. *Wauchope*, 4 June 1822; Stair i. 6, 30.

(*d*) *Home and Another* v. *Pringle*, 22 June 1841, 2 Rob. Appeals, p. 384.

(*e*) *Cullen* v. *Baillie*, 20 Feb. 1846, 8 D. 511; *Bon Accord Insurance Co.* v. *Soutter's Trs.*, 13 June 1850, 12 D. 1010; *Findlay's Trs.* v. *M'Omie*, 6 March 1852, 14 D. 621; *Gray and Others*, 12 Nov. 1856, 19 D. 1; *Wellwood's Trs.*, 17 Dec. 1856, 19 D. 187; *Fegan* v. *Thomson*, 20 July 1855, 17 D. 1146; *Lauder* v. *Miller*, 15 July 1859, 21 D. 1353. In *Miller's Trs.* v. *Miller*, 23 Feb. 1848, 10 D. 765, payments to a co-trustee as factor were sustained because made in 1816, and at a time when such was the universal practice. See the case of *Johnstone's Trs.*, 4 Jan. 1738, reported 21 D. 1383.

(*f*) *Supra*, p. 149.

although summonses have been sustained where the tutors sued in name of the pupil; or the writs were allowed to be corrected so as to substitute the tutor as pursuer, and as the party to whom the defender was to pay (*a*). The tutor's name must be given; 'the tutors of A. B.,' without any specification of individual names and designations, is not a *nomen juris* under which parties can sue or defend, or use diligence (*b*). In conducting a litigation on behalf of a pupil, a tutor is bound to state every legal plea, and cannot waive any, even on a point of form, without incurring responsibility for breach of duty (*c*). An admission by him will bar a plea of prescription on the part of the pupil, if the subject-matter of the litigation lay within his own administration (*d*). But a reference to the oath of the tutor will not be held conclusive against the pupil, except the matter referred has taken place with the tutor himself, and during his administration (*e*). It is within the powers of a tutor, as *dominus litis*, and in the exercise of a sound discretion, to refer the matter at issue in a litigation to the adversary's oath (*f*).

Expenses incurred by tutors in litigations.

In deciding as to the expenses of any litigation, in which guardians are engaged, the Court look with great favour upon them. The severe liabilities which they incur, by neglecting to institute actions, or to defend them on behalf of their pupil; the absence of that entire free will which a person possesses with regard to his own property; the imperative necessity of acting (unlike trustees) without the advice and assistance of their constituent, and the many restrictions which fetter their powers of compromising disputed claims,—are all circumstances to be taken into consideration in settling the question of expenses. Although, therefore, they be the losing party, it does not follow that they suffer the penalty of a litigation lost. On the contrary, they may be found entitled, even

(*a*) *Fleming* v. *Dickson*, M. 16221 (1545); *Keith* v. *Archer*, 24 Nov. 1836, 15 S. 116; *M'Kenzie* v. *Sinclair*, 26 June 1834, 12 S. 822.

(*b*) See *Bell* v. *Trotter's Trs.*, 20 Jan. 1841, 3 D. 380.

(*c*) *Hunter* v. *Hunter*, M. 16341 (1739); More's Notes, p. xxxviii.

(*d*) *Watson* v. *Davidson*, Elch. *v.* Tutor, No. 10, M. 11077, 5 Sup. 167, 1 Cr. and Stew. Appeals, p. 288 (1739).

(*e*) Stair i. 6, 20; Bankt. i. 7, 46. *Cant* v. *Lock*, M. 12029 (1665); *Eccles* v. *Eccles*, M. 16270 (1664); *Hay* v. *Ogston*, M. 16276 (1666). *Supra*, p. 243, and *infra*, p. 277 (*d*).

(*f*) Dig. xii. 2, 35, Pr. *Tirias* v. *Balbedy*, M. 16303 (1682).

in these circumstances, to full expenses (*a*). Even where expenses are given, the tutor will not in general be liable personally (*b*). If they lose a litigation in which they are engaged with the pupil, and do not obtain their expenses in it, they may claim them, and in favourable circumstances will receive them in the accounting with their ward (*c*). Whether tutors are found entitled to expenses in the original litigation or not, they have a good claim against the pupil for these expenses, when they have been properly incurred, either for the benefit of the pupil or in defence of the father's nomination. 'Had this been a process of constitution against Miss Beattie (the pupil), I think I should have had little difficulty in finding that it was a proper debt against her; or if there had been funds in the hands of the raisers belonging to her, over which no other party had a claim, I would have given decree; for, although the amount arose from costs of suit, it cannot be maintained that the right to receive payment can only be found in the suit itself, or that such costs can only be recovered from the opposite party in it, by prevailing in it. If incurred in any suit maintained for the pupil's interest, and in support of the nomination of her father, although it has proved unsuccessful, they must be reimbursed; and it must be sustained as a debt against Miss Beattie, for such a claim does not depend upon its successful issue in Court. No doubt, if it could be alleged that there was any improper or reckless litigation, unsanctioned by counsel, or for any unworthy motive contrary to the interest of the pupil, this would be a very different question. But here nothing of the kind can be alleged; and without holding that the decision against the pursuers (tutors nominated by the father) was a wrong judgment, we may fairly say it was a debateable question, and proper to be tried, considering the support their plea received from an equal number of the judges who came to adjudicate upon the case' (*d*). The principle of the rule was well

(*a*) *Gall* v. *Thomson*, 30 June 1840, 2 D. 1234; *M'Culloch* v. *Murray*, 19 Feb. 1805, not reported.

(*b*) *Forbes* v. *Morrison*, 10 June 1845, 7 D. 853; *Baxter and Mitchell* v. *Wood*, 24 March 1864, 2 Macph. 915.

(*c*) *Johnstone* v. *Beattie*, 29 Jan. 1856, 18 D. 343. In a previous case, *Beattie* v. *Johnston*, 15 Dec. 1849, 12 D. 357, the Court had refused to allow these expenses to be charged against a particular fund in the hands of the tutors, but reserved the right of the tutors to claim them in the accounting.

(*d*) *Per* Lord Medwyn in *Beattie*

expressed by Lord Cockburn on one occasion: 'The general rule is, that they (gratuitous trustees) are never to litigate with such gross unreasonableness as implies a disregard of their duty. But in judging whether they have actually done so or not, we can rarely determine merely from the result. A reasonable action may have an unfortunate issue. We must look to the whole circumstances. And where a trustee, though not perhaps proceeding with perfect wisdom, appears upon the whole to have acted according to his warrant, and with a sincere desire to do right, a court is not called upon to visit him personally with loss, which his honest and reasonable view of his duty may have occasioned to the estate' (*a*). If the action be clearly a calumnious and improper one, or if the defence be totally unwarranted by the circumstances, expenses will not only be refused the tutor, but he will not be allowed to charge them against his ward (*b*), and he will be made liable to the opposite party personally in the latter's expenses (*c*). It has accordingly been held, that wherever expense of litigation for the recovery of trust funds and papers has been necessitated by the improper conduct of the trustee, he must bear that expense himself (*d*).

v. *Johnston*, *supra*. See *Baxter and Mitchell* v. *Wood*, *supra*. See *infra*, Part i. Div. iii. s. 2, Disbursements of Tutor. In *Ramsay's Trs.* v. *Souter*, 18 Dec. 1863, 2 Macph. 343, it was held that where business has actually been done for the benefit of the trust, such business may be charged against the estate, although there is no specific evidence of express employment by the trustees.

(*a*) *Per* Lord Cockburn in *Cameron* v. *Anderson*, 12 Nov. 1844, 7 D. 92.

(*b*) Code v. 37, 6; Bankt. i. 7, 28; *Haly* v. *Sands*, M. 16354; Elch. *v.* Tack, No. 15 (1749). See *Cameron* v. *Anderson*, 12 Nov. 1844, 7 D. 92; *Bogie* v. *Bogie*, 18 Dec. 1840, 3 D. 309; *Kay* v. *Wilson's Trs.*, 6 March 1850, 12 D. 845; *Graham* v. *Marshall*, 22 Nov. 1860, 23 D. 41.

(*c*) *Ibid.*, and *per* Lord Mackenzie in *Forbes* v. *Morrison*, *ut sup.* The rule of the Roman law is verbatim, according to these Scotch authorities: Non est ignotum tutores vel curatores, si nomine pupillorum vel adultorum scientes calumniosas instituant actiones, eo nomine condemnari opportere; ne sub pretextu nominis eorum propter suas simultates secure lites suas exercere posse existiment.—Code v. 37, 6.

(*d*) *Fotheringham* v. *Salton*, 3 Feb. 1852, 14 D. 427; *Hill*, petr., 15 Jan. 1856, 18 D. 316; *Morrison*, petr., 5 Dec. 1856, 19 D. 132. In this last case the Court refused to allow a judicial factor on a trust estate credit for the expense of a previous application, which was refused on the ground of his having invested the trust funds on railway securities. It was alleged, however, that the liferenters of the estate had expressed a wish for the mode of investment disapproved of by the Court; and an opinion was expressed, that if it were so, the trustee had a good claim for these expenses against them.

How a tutor is sued.

2. Actions against the pupil should be laid against him as the principal defender, and against the tutor *qua* such. The pupil, though he has no *persona standi*, is here a passive agent, and must be cited either personally or at his dwelling-place (*a*). As pursuer again, he *acts*. The citation to the tutors is edictal, at the market-cross of the head burgh of the jurisdiction where the pupil resides. They are cited as 'the tutors and curators of A. B.,' the pupil, without being named (*b*). It has been recently held that a pupil was not competently made a party to an action in the following circumstances:—The action was raised concluding against the pupil as representing his father, and against his father's trustees *nominatim* (who had by the father been appointed tutors). The summons was executed against the pupil and his tutors and curators, if he any had, but in the *partibus* there was no mention of tutors and curators; a joint defence was given in, in name of the pupil and of the trustees *eo nomine*. The judgment of the Court was, that the pupil was not properly brought into Court—the action not being *called* against the tutors *qua* tutors (*c*).

If the edictal citation to tutors be not given, a decree against the pupil will be null; and if the objection be stated while the case is pending, the action will be dismissed (*d*). The citation to a father, who is administrator-in-law for his child, may be either special or edictal (*e*). Edictal citation of guardians ought to be at the market-cross of the head burgh of the minor's residence when

(*a*) See *Govan* v. *Thomson*, 20 Dec. 1814, F. C., with More's Notes, p. xxxix.; and Ivory's Erskine, note 219 to Ersk. i. 7, 24.

(*b*) Stair iv. 38, 23; Bruce, p. 356; Ersk. i. 7, 24, and iv. 1, 8; *Fairholm* v. *Mackenzie*, Mor. 3709 (1710); *Elphingston* v. *Bruce*, M. 2178 (1610); Shand's Practice, p. 142; Campbell on Citation, pp. 81 seq.

(*c*) *Craven* v. *Elibank's Trs.*, *supra*, p. 160.

(*d*) *Maxwell* v. *Brown*, Elch. *v.* Adjudication, No. 13 (1737); *Dalgleish* v. *Hamilton*, M. 2184 (1752); *M'Turk* v. *Marshall*, 7 Feb. 1815, F. C.; *Brackenridge*, 1809, in 1 Bell's Com. p. 705, No. 3; Ivory's note 213 to Ersk. i. 7, 24. It is right, however, to notice that it has been said by the Lord Justice-Clerk (Hope): The Court gives no opinion on the point, whether in the case of a pupil (there may be a difference as to the case of a minor) it is necessary, in order to make the pupil a party to the cause, the summons should contain conclusions against the tutors *nominatim*, if he any has. I think that is a very important and serious point; and all of the Court, I understand, reserve their opinions on that point.

(*e*) *Buchanan* v. *Gray*, M. App. *v.* Adjudication, No. 12 (1801); *Kinghorn* v. *Collace*, M. 2180 (1626); *Lie* v. *Porteous*, M. 2182 (1630).

he is within Scotland (*a*). Tutors and curators ought to be cited, though in reality there be none (*b*). When the pupil is out of the country, he as well as the tutor is cited at the office of the Keeper of Edictal Citations (*c*); but though the tutor be out of the kingdom, he is cited edictally at the market-cross of the head burgh of the pupil's residence, if the pupil be in this country; and the *induciæ legales* allowed the tutor so out of the country will be the ordinary *induciæ* given him as if he were in this country, because he is not the principal to the suit (*d*). If cited personally, though not edictally, the citation to tutors and curators will be sustained as a valid citation (*e*). Fountainhall, without mentioning whether it was a decision of the Court, lays down the rule, 'that when a minor or pupil is lawfully charged to enter heir, etc., their tutors or curators need not be called, in regard it is not a fact prestable by them' (*f*). Professor More has adopted this doctrine (*g*); but it has not been supported by the later authorities (*h*). To a process of wakening, tutors have been allowed to be cited *incidenter cum processu* (*i*), and curators do not need to be certiorated in extrajudicial acts, such as wakenings (*k*).

How creditor of pupil enforces his decree.

A creditor of a pupil obtains decree against him as principal defender, and against the tutor for his interest. This decree may be enforced against the pupil's estate, but not against his person (*l*).

How far the tutor is personally liable for pupil's debts.

In reference to the personal liability of tutors, a distinction must be made between the debts of the pupil which were owing at the time when he entered upon office, and those obligations which he himself *qua* tutor has undertaken.

(*a*) *Fairholm* v. *Mackenzie*, M. 3709 (1710); *Dalgleish* v. *Hamilton*, M. 2184 (1752); *Elphingston* v. *Bruce* (1610), M. 2178.

(*b*) *Crighton* v. *Lord Rossie*, M. 2178 (1573); *Maitland*, 6 March 1573, 1 Kames' Dict. p. 132. But see Ersk. iv. 1, 7 and 8.

(*c*) A. S. 11 July 1828, s. 22; 3 Juridical Styles, p. 970, and p. 6.

(*d*) *Fairholm* v. *Mackenzie*, M. 6862 and 3709 (1710).

(*e*) *Carnousie* v. *Tekmuir*, M. 2181 and 16253 (1629); see 13454 and 1 Sup. 299. *Lie* v. *Porteous*, M. 2182 (1630). The citation in this case was found sufficient, though the father alone was summoned, while the minor had other curators. See also *Erskine* v. *Erskine*, 11 March 1852, 14 D. 766; *Colville* v. *Malcolm*, 8 June 1843, Jur.

(*f*) 2 Sup. 466 (1670).

(*g*) More's Notes, p. xxxix.

(*h*) *Maxwell* v. *Brown*, Elch. *v.* Adjudication 13 (1737); *Robertson* v. *Robertson*, 31 Jan. 1805, stated in 1 Bell's Com. p. 743.

(*i*) *Lockhart* v. *Elies* (1680), M. 2183.

(*k*) *Burnett* v. *Turnbull* (1628), M. 2181.

(*l*) *Supra*, p. 162.

Liability for debts not contracted by tutor.

In regard to the first of these, the law stated by the institutional writers, and recognised in the older decisions, seems yet to be the law of Scotland. It is thus stated by Lord Stair (Stair i. 6, 20): 'In decreets for payment of liquid sums, execution cannot be made against the means of the tutors, unless they be specially decerned to make forthcoming so much of the pupil's means as they have in their hands for satisfying of the debt in whole or in part; which, though it be often done by a second process, yet may be a distinct member of the first, or by way of special charge in the discussing of a suspension raised by the tutor against creditors on that or other grounds.' The same doctrine is stated by Erskine and Bankton (Ersk. i. 7, 24 *in med.;* Bankt. i. 7, 46), and has been sanctioned by decision. A tutor has been found not liable for the debt of a pupil due by the pupil as heir of his father, 'except the pursuers will prove that she as tutrix has intromitted, or might intromit, with as much of the minor's gear as will pay the debt' (*a*).

Liability for debts contracted by tutor himself.

In regard to the second class of cases, where the tutor himself incurs the debt or undertakes the obligation, he will be personally liable therefor,—a doctrine deducible from a decision of the House of Lords in regard to trustees. The House held that trustees who, within the power of the deed creating the trust, invested trust funds in bank shares, purchased from the bank, and signed the contract of copartnery as *trustees*, and were so designed in the register, were held, even in a question *inter socios*, liable for calls personally, and not merely to the extent of the trust estate (*b*). Therefore if a tutor even *tutorio nomine* become partner in a joint-stock company, or sign bills, or grant bonds, or contract debts, the general rule is that he is personally responsible. To this rule there may be exceptions, where it appears from the instrument itself that it was not the intention of the contracting parties that the tutor should be so liable (*c*).

Does tutor's liability ter-

Stair says, that 'when tutory is ended, whatsoever the tutor

(*a*) *Auchinleck* v. *Cathcart*, M. 16262 (1632). See also *Cassilis* v. *Ruglen*, M. 16334 (1713); *Wallace* v. *Anderson*, 21 Nov. 1826, 5 S. and D. 179.

(*b*) *Lumsden* v. *Buchanan*, 26 Feb. 1864, 2 Macph. 695; revd. 22 June 1865.

(*c*) *Campbell* v. *Gordon*, 21 Feb. 1840, aff. 13 June 1842, 1 Bell's Appeals, p. 428; and in Jury Court 20 March 1844, 6 D. 1030. This was a case of a bond granted by trustees, and it is not easy to reconcile the judgment with that in the case of *Buchanan*.

acted in name of the pupil, the pupil hath thereupon action, as if it had been done by himself. So whatever was decerned against the tutor *hoc nomine*, ceaseth when the tutory is ended, and there is action competent against the pupil therefor' (Stair i. 6, 27; Bankt. i. 7, 46). That the tutor's liability ceases with the tutory, is only true in regard to the first class of cases above mentioned; but is not true in reference to the obligations where the tutor is personally responsible.

minate with the tutory.

In those cases where the obligation incumbent on the pupil is not to pay a sum of money, but *ad factum præstandum*,—such as the renewing the investiture of vassals; granting dispositions, charters, or leases in terms of previous obligation, and other acts of a similar description,—the tutor may be compelled by the usual compulsitors of the law to implement the obligation (*a*).

Tutor personally liable for non-pecuniary obligations.

An arrestment must be lodged in the hands of the tutor, not of the pupil (*b*); and where there are several tutors, the arrestment is not effectual if not made with the whole of them (*c*).

Arrestments against tutors.

It is incompetent to refer to the oath of a tutor matters involved in an action to which he is a party, but arising prior to his appointment (*d*).

Reference to tutor's oath.

XV. It is a general rule, that the acts of a third party not authorized as agent to do them, impose no obligation or confer any right upon another (*e*); and, consequently, as the pupil is bound by the actings of the tutor within the bounds of his administratorial authority, he must be so by direct and positive law (*f*). It is the general rule of law, that whatever is done in this manner by the tutor, is considered as the proper deed of the pupil. And whether he obliges himself for the pupil as tutor, or whether others become bound to him in this character; and whether he obtains decree against third parties, or they against him, it is the pupil that becomes thereby creditor or debtor, and the obligations and decrees have their effect for or against him, though, as already shown, the tutor may also be personally liable (*g*). The pupil is, in consequence, when

How far tutor's acts bind pupil.

(*a*) Stair i. 6, 20; Bankt. i. 7, 46; Ersk. i. 7, 24.

(*b*) *Supra*, p. 162.

(*c*) See as to trustees, *Black* v. *Scott*, 22 Jan. 1830, 8 S. 367.

(*d*) *Stuart* v. *Syme*, 12 Dec. 1815, F. C.; *supra*, p. 243.

(*e*) Inst. iii. 19; Dig. xliv. 7, 11; Dig. l. 17, 73 *in fin.*; Code iv. 10, 3; Stair i. 6, 27; 1 Domat, pp. 260–1.

(*f*) Dig. xiii. 7, 11, ss. 6 and 7; Code v. 39, 5.

(*g*) Dig. xxvi. 7, 2; Dig. xxvi. 9, 7;

he arrives at full age, entitled to found upon contracts entered into by the tutor, and to exact fulfilment of them (*a*); and he is, in like manner, bound to implement to others all obligations validly imposed on him by his tutor. Thus, minors were found liable to a third party for expenses and remuneration, in relation to a matter on which he was employed by their factor *loco tutoris* (*b*). But the dole of the tutor neither profits nor hurts the pupil; for that the tutor himself is alone responsible (*c*). But 'if the pupil be advantaged by the fraud of the tutor, he may be therefor convened' (Stair i. 6, 27).

In particular, payment of debt made to the tutor by debtors of the pupil, though not compelled so to do by decree of a court, will be an effectual bar against any claim thereafter made by the pupil, even though the tutor have misapplied the money he received (*d*). But the debtor making payment to the tutor ought to be satisfied of the tutor's title to act, and that he has done nothing since his appointment to disqualify him for the office, such as being outlawed, or (if a female) by entering into a marriage, etc. On such events happening, the tutor's authority is at an end, and the debtor pays to him at his own risk (*e*). The tutor's vitious intromission does not infer a passive title against the pupil, that being a delinquency which a tutor cannot commit for a pupil (*f*).

The general rule exemplified in many forms is, that the pupil is bound by the lawful act of the tutor, in the same way as he would be if, being *sui juris*, he had himself entered into the transaction (*g*); and as a converse rule, everything acquired by the

Code v. 39, 7; Code v. 39, 3; Dig. xxvi. 9, 8.

(*a*) Stair i. 6, 27; Code v. 39, 5; Dig. xiii. 5, 5, ss. 7, 8, and 9; Dig. xxvi. 7, 9; Dig. xxvi. 9, 2, 6; 1 Domat, p. 268, No. 9.

(*b*) *Orr* v. *Ross*, 16 May 1822, 1 S. 412; 1 Domat, p. 268, No. 9.

(*c*) Dig. xxvi. 9, 3. See Noodt's Commentary, particularly on Dig. xxvi. 9, vol. ii. p. 564; 1 Domat, p. 268, No. 9.

(*d*) Dig. xxvi. 7, 46, 5 *et ult.*, *et* l. 47; Dig. xxvi. 7, 12, 1; Code v. 37, 25; Craig ii. 20, 15 *ad fin.*; *A.* v. *B.*, M. 16219 (1540); *Lands* v. *Douglas*, M. 16250 (1629); *Kinghorn* v. *Strangfathers*, M. 16256 (1631); *Applegirth* v. *Lockerby*, M. 16282 (1670); *Forrester* v. *Forrester*, M. 16330 (1711); *Cattanach* v. *Thom's Exrs.*, 2 July 1858, 20 D. 1206. See *supra*, p. 167.

(*e*) *Forbeses* v. *Forbes*, M. 16287 (1673).

(*f*) *Kerr* v. *Bremner*, 2 S. and M'L. 895, adhered to by Court of Session, 5 March 1839; partly affirmed and reversed 9 May 1842, 1 Bell's Cases, p. 280.

(*g*) *Morton* v. *Muirhead*, M. 8931 (1749).

tutor *quâ* such belongs to the pupil. Thus a minor daughter, who survived her mother, was found to have acquired a vested right to her mother's share of the moveables, without confirmation, in respect that the possession of them by her father was, in law, the possession of the minor; and it was observed that in this question, no distinction could be entertained between the case of minority and that of pupilage (*a*).

Tutor *auctor in rem suam.*

XVI. It is as the representative and trustee of the pupil that the tutor appears in all the transactions of his office. A principle applicable to all offices of trust of this kind, and more especially of guardianship, is this, that the person acting with such deputed power shall not abuse the confidence placed in him by enriching himself at his constituent's expense, by using the knowledge he has acquired to make advantageous transactions for himself with the means of those for whom he acts; that he shall not be seller and purchaser,—the granter of the obligation, and the creditor under it,—the donor and the donee; in short, that he shall not be *auctor in rem suam.* This rule simply means this, that the tutor shall not, either directly or *per ambages*, be a party to any deed whereby an obligation is constituted in his own favour against the pupil. It is just as incompetent for him to do this as it would be for a person to be judge in his own cause (*b*).

'The principles which regulate this part of the law are deeply seated both in the law of Scotland and in the civil law. One of these principles undoubtedly is, that a party in a fiduciary character —a party who is either a tutor or a trustee, and who therefore has either to interpose his own authority to the administration of an estate, or has himself to administer it, in absence of any other party —who has a power of administration,—one principle is, that these parties cannot be *auctores in rem suam;* and that perhaps is sufficient with reference to a great many of the cases which arise in

(*a*) *Jamieson* v. *Spottiswoode's Trs.*, 6 Dec. 1808, F. C.

(*b*) Craig i. 15, 24; Stair i. 6, 17; Ersk. i. 7, 19; Kames' Equity, p. 375; Vinnius' Com. on Institute, i. 21, 3. Craig, *loc. cit.*, indulges in some vehement declamatory condemnation against an opposite rule, which appears to have been sanctioned in his day by certain decisions of the Court, which had in view more the interests of a powerful tutor than justice to the helpless ward. *Aberdeen Railway Co.* v. *Blaikie*, H. of L., May 1853 and July 1854, 1 Macq. 461; *Perston* v. *Perston's Trs.*, 9 June 1863, 1 Macph. 245.

regard to that matter. No man who has authority to interpose for others, or who has to administer an estate for others, can administer that estate for his own benefit. That a tutor cannot buy from his ward, or from himself as tutor, is perfectly clear; that he cannot take a lease of the lands under his administration is clear; and I humbly think that no trustee can enter into any contract accruing to his own benefit with the trust estate' (*a*). 'In various cases, and in particular in that of *Black* v. *Cochrane* in 1855, I have had occasion to advert to the principle established in this country and in England affecting the powers of trustees in their management of the trust estate, and their responsibilities. The basis of the rules on which we have acted in this country will be found in the expansion of the principle in the law of tutors and curators, that no party in that trust relation can be *auctor in rem suam*. This was the principle of the Roman law, and it is firmly imbedded in the common law of Scotland. That the principle was for a time lost sight of is true; but under the operation of judgments of the House of Lords it has attained its full strength, and been carried to all persons who are vested with trust administration' (*b*). A deed of this kind by a tutor to himself, or by a curator, though with the consent of the minor *pubes*, is a nullity (*c*). 'It is vain to say that the rule obtains only where there has been "some obvious and flagrant wrong." Were that required to be established, I can conceive few more obvious and flagrant acts of wrong-doing (in the legal acceptation of the term) than for trustees, specially directed to invest in heritable securities or the public funds, taking the money entrusted to them, and for years exposing it, for their own profit, to all the risks of a trading concern. But the principle of the decisions in England on this point is quite misrepresented in so stating it. According to all the authorities, accountability for profits exists, although there be entire absence of *mala fides*. The great principle anxiously and incessantly repeated by all the judges whose views are recorded is, that no trustee shall make profit by his office' (*d*).

'Trustees are not entitled individually to separate themselves

(*a*) *Per* Lord Neaves in *Perston*, *supra*.

(*b*) *Per* Lord Cowan in *Perston*, *ibid.*

(*c*) *M'Gibbon* v. *M'Gibbon*, 5 March 1852, 14 D. 605, and 1 Stuart 569; *Manuel* v. *Manuel*, 15 Jan. 1853, 15 D. 284.

(*d*) *Per* Lord Cowan in *Cochrane* v. *Black*, 1 Feb. 1855, 17 D. 338.

from the body of trustees for the purpose of dealing or transacting with the trustees or the trust estate upon their own account, under any pretence whatever. This rule depends upon more considerations than one. It is clearly inexpedient that a trustee should be allowed to place himself in a position adverse to the interests of the trust which he has undertaken to manage. That is one view. But it is also a clear dereliction of duty upon the part of the trustee, that in any transaction into which the trust and the trustees are about to enter, he should withdraw himself from the administration, and deprive them of the weight of his authority and the benefit of his advice' (*a*).

Deeds in tutor's favour must be acquired while the tutory subsists.

The deeds liable to the objection *tutor auctor*, etc., are those only which are executed during the subsistence of the tutory. If the tutor had acquired the rights objected to before he accepted office, or after it came to a close, they are as unchallengeable as rights acquired by any third party (*b*). A bill was granted by two parties in favour of a person who had been tutor and curator to one of them, but after his majority. A reduction of it was brought, on the ground that the debt was not due, and that the tutor had not accounted. The Court held this not a sufficient ground for reducing the bill (*c*). On the other hand, if the deed liable to the objection had been obtained during the subsistence of the office, it may be set aside at the instance of the minor any time within the long prescription (*d*).

Direct alienations by tutor to himself. Purchases.

(1.) It is clear law, that the tutor cannot directly convey to himself any part of his ward's estate, or even purchase it (*e*). But, on the authority of the Roman law (*f*), it has been said that such

(*a*) *Per* Lord Justice-Clerk (Inglis) in *Perston* v. *Perston's Trs.*, *supra*.

(*b*) Stair i. 6, 17; *Parkhill* v. *Chalmers*, M. 16365, aff. (1771); *Ninewells* or *Nisbet* v. *Smith*, M. 16310, 3 Sup. 594, and M. 12081 (1687); *Dewar* v. *Dewar*, Mor. 16241 (1619); *Nasmith* v. *Nasmith*, M. 16247 (1627); *M'Alexander* v. *M'Alexander*, M. 16293 (1677).

(*c*) *Bennet* v. *Reid's Trs.*, 27 May 1828, 6 S. 854.

(*d*) *Thomson* v. *Pagan*, M. 8985 (1781); *M'Kenzie* v. *Fairholm*, M. 8959 (1666); *Manuel* v. *Manuel*, 15 Jan. 1853, 15 D. 284; *M'Gibbon* v. *M'Gibbon*, 5 March 1852, 14 D. 605, overturning *Bannatyne* v. *Trotter*, M. 8983 (1704); *Bontine* v. *Graham*, 20 Dec. 1838, F. C., and 1 D. 286 and 631.

(*e*) Stair i. 6, 17; Bankt. i. 7, 39; Ersk. i. 7, 19. Tutor rem pupilli emere non potest; idemque porrigendum est ad similia, id est ad curatores, procuratores, et qui negotia aliena gerunt. Dig. xviii. 1, 34, 7.

(*f*) Code iv. 38, 5; Arg. Dig. xxvi. 7, 56.

a purchase might be made, if done at a public auction, where there is no chance of collusion, and where everything, it is presumed, is fairly carried through (*a*). This question has sometimes occurred with regard to trustees, judicial factors, and creditors in heritable bonds selling the subject of the security; and in such cases (*b*), unless in very special circumstances (*c*), the Court have invariably refused to recognise this limitation of the principle of the Roman law. The impossibility of preventing mal-practices; the power of fixing the place and time of sale, possessed by the exposer; his knowledge of the condition of the subjects, and the state of the titles, and other considerations of a similar kind, have induced the Courts to hold purchases made in such circumstances to be null. There are unreported cases to the same effect with regard to tutors. It was found that a purchase of a house belonging to the pupil, made by the tutor at a public sale, and afterwards sold by him to an onerous purchaser, was invalid; the whole transaction was reduced (*d*).

Loans, or tutor's use of pupil's funds.

A tutor cannot lend money to the pupil, so as to lay the latter under obligation to him (*e*); and the converse also holds, that a tutor cannot take to himself in loan his ward's funds, even though he give heritable security (*f*).

Trustees employing the funds of the trust in their own trade.

In a recent case, trustees who had employed the beneficiaries' funds in their trade were compelled to account for the profits they made with them. The case was this:—A truster at his death had his funds in the hands of a mercantile firm, two partners of which

(*a*) Bankt. i. 7, 39; Ersk. i. 7, 19.

(*b*) Brown on Sale, pp. 183 and 193; cases there cited. *Ex parte James*, 8 Ves. jun. 337; *Crawford* v. *Hepburn*, 6 March 1767, M. 16208; *York Buildings Co.* v. *M'Kenzie*, M. 13367 (1793), H. of L. 13 May 1795, 2 Paton App. 378; *Jeffrey* v. *Aitken*, 16 June 1826, 4 S. 722; *Taylor* v. *Watson*, 20 Jan. 1846, 8 D. 400. See particularly the Lord Ordinary's note and the speeches of the judges in this last case.

(*c*) *Maxwell* v. *Drummond's Trs.*, 21 Jan. 1823, 2 S. 130. See also *Brown* v. *Burt*, 23 Dec. 1848, 11 D. 338, where lands belonging to a sequestrated estate, being exposed to public roup, and knocked down to the son of the trustee, the sale was subsequently set aside, and the trustee, who resigned the office on an action to remove him being brought, was subjected in the expenses of that action.

(*d*) *Buchanan* v. *Carsewell*, 29 Nov. 1809, Hume Sess. Papers; *Robertson* v. *Robertson*, 30 May 1806, Hume Sess. Papers.

(*e*) Ersk. i. 7, 19. See *contra*, Dig. xxvi. 7, 7, 4; Dig. xxvi. 7, 54; Code v. 56, 1.

(*f*) *Elphinstone* v. *Robertson*, 28 May 1814, F. C.

he appointed his trustees, and directed to invest his funds in a certain way for the purposes of the trust. Instead of doing this, they continued to employ it in the firm, paying the beneficiaries five per cent. interest. Whenever it was demanded, they did invest the capital as directed, and there was no suspicion of *mala fides*. It was held that the beneficiaries were entitled to claim the profits, if any, realized by the trustees, over and above the five per cent. which they had paid (*a*). 'I am of opinion that trustees so employing the funds under their management are liable to account to the beneficiaries for the whole profits that they (the trustees) may have thereby made. I think it arises out of the very nature of a trust, that a trustee shall not be allowed to lay out and use the trust monies, so as to make profit of them for himself, because that is contrary to the purpose for which the fund is placed in his hands, and to the duty which he owes to the beneficiaries. He is a mere manager of the fund, liable as such in certain duties and responsibilities. If he mismanages and violates his duty as trustee, and the fund is lost, he will be bound to replace it. But his liabilities are not in all cases limited to a mere accounting for the amount of the fund; for the fund being the property of the beneficiaries, if he employs it, not to the incurring a loss, but to the making of a profit, by embarking it in trade or otherwise, it is not enough that he makes the fund forthcoming with the ordinary interest that might have been procured on proper investments—he must account for the profit to the beneficiaries whose property the fund is. He cannot possibly be a gainer by its employment. Every gain must be for their, not his, advantage.

'This is a doctrine well established in the law of England. The rule is, that whenever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof (which the law holds to be a breach of trust, even when there is no specific direction as to the investment of the trust fund), he shall, in the election of the *cestuis que trust*, either account for all the gain which he has made, or be charged with interest at five per cent. or four per cent., according to circumstances, five per cent. being the lowest rate when the funds have been embarked in

(*a*) *Cochrane* v. *Black*, 1 Feb. 1855, 17 D. 321; and 16 July 1857, 19 D. 1019.

trade, the law presuming that every business yields a profit to that amount.

Tutors and trustees must account for profits made.

'It is true that at one time there was a disposition not to order an account of profits to be taken in those cases where the trustee had mixed the trust fund with his private monies, and employed it in a business of his own, or in a business in which he was a partner. This, however, arose not because the principle did not extend to such cases equally as to others, or from the smallest doubt that it did so,—for its application was too clear to admit of doubt,—but from the impression of the difficulty of tracing or apportioning the profits of the misapplied fund; and the Courts were thus induced, instead of attempting such inquiry, to confine the claim against the trustee, in these instances, to a charge of five per cent. interest, either without or with rests and accumulations. Accordingly, in the case of *Docker* v. *Somes* in 1834 (*a*), decided by Lord Brougham, it was held that no distinction could consistently be drawn, excepting from the general rule cases of the above description, in which, as Lord Brougham observed, the risk of malversation is most imminent; adding, that its ever having been recognised seems at first sight grossly absurd, "and some reflection is required to understand how the Court could ever, even in appearance, countenance such an anomaly." And his Lordship, after an analysis of the various authorities, stated the following as the result at which he arrived: "That the parties whose funds have been misapplied should in every case have their option of receiving either the actual profits made, or interest at four or five per cent., according to circumstances, appears a rule exposed to no serious objection; and although the Court, moved by special circumstances, may allow rests with compound interest, yet this seems, generally speaking, much less advisable than an account of actual profits"' (*b*).

In another case, decided about the same time, where a partner of a trading company died, and left a settlement, by which he appointed *inter alios* a partner to be one of his trustees, and ordered his funds to be realized and divided in twelve months. By the terms of the copartnery the interest of a deceasing partner was to

(*a*) 2 M. and K. 655.

(*b*) *Per* Lord Wood in *Cochrane* v. *Black*, *supra*, quoted with approval in *Douglas* v. *Douglas' Trs.*, 20 July 1864, 2 Macph. 1379.

be realized, and paid by instalments to his representatives within eighteen months. That part of the trust funds which consisted of the interest of the partnership was not realized, but was allowed to remain in the hands of the company for several years. It was held that the trustee was liable for profits on the funds so unrealized. Lord Ivory observed: 'As a question of trust management, the question resolves itself into a very simple result—No trustee can make individual profit out of his trust. In other words, he cannot be "*auctor in rem suam.*" This principle is recognised, and has always been so, in Scotland as well as in England; nor is there any difference in its equitable application and effects in the two countries. It applies to the case of trustee, tutor, judicial factor, commissioner, agent; in fact, wherever the trust character exists the duty attaches, and the necessary effects of this principle are enforced. It applies to a purchase or a lease with the means of the beneficiary; and there is a disqualification even to make professional charges for work beneficially performed. Indeed, the rule may be reduced into the narrowest compass; and this question brings it to a point—"Why should any party employing funds of another for the purpose of profit, himself appropriate the benefit?"

'Take the simplest and most direct view that occurs. If the trustee has put out his constituent's money to any speculation—whether along with others, as his share of a common stock, or by himself alone, as sole trader—the rule is, that the profits accrue to the estate, the loss to the trustee. The act is a breach of duty; but this is a cumulative rather than exclusive ground, for the real principle is, that the trustee cannot profit by any use of the trust estate. If he join others in speculation in a trading adventure, and furnishes the capital for all out of the trust estate, still it is the same —exactly the same, of course, as to his own share, but not less so as to that of the rest of the partners. The whole are tainted by the abuse of trust, and each, as a *particeps*, is liable accordingly.

'But to come nearer to the case in hand. If, being already a partner with his truster, the trustee retain money of the latter, whether stock or debt, in his own company's hands, or (which is the same thing) leaves it with the company of which both have been partners; and still more if he does so, where, as here, there are distinct directions on the part of the truster to realize and

divide, he is liable for the profits, and has committed a breach of trust' (*a*).

It has been said, that if there were a number of tutors or trustees, they could lend the ward's funds to one of themselves on heritable but not personal security (*b*). This point was very fully considered in reference to trustees, and on a review of all the authorities the Court held unanimously that it is illegal for trustees to lend trust funds to one of their number, even on heritable security. The case was one in which trustees had lent funds belonging to the trust to one of their own number, who was a son of the truster, and a beneficiary; and loss having arisen upon the transaction, the trustees were found personally liable to make it good. The opinions of the judges are very instructive as to the sound principles of law on which the judgment is based (*c*). The rule

(*a*) *Laird* v. *Laird*, 26 June 1855, 17 D. 984.

(*b*) See *Moffat* v. *Robertson*, 31 Jan. 1834, 12 S. 369, and Ersk. i. 7, 19. But see *Mayne* v. *M'Keand*, 4 June 1835, 13 S. 570; *Blane* v. *Paterson*, 28 Jan. 1836, 14 S. 361; *Watson* v. *Crawcour*, 9 June 1843, 5 D. 1182; *Ross* v. *Allan's Trs.*, 13 Nov. 1850, 13 D. 44.

(*c*) *Perston* v. *Perston's Trs.*, 9 Jan. 1863, 1 Macph. 245. The same point was decided in M.P. *Salmon's Trs.* v. *Salmon*, 2 Feb. 1861, unreported. In that case the truster had appointed certain parties trustees, for the purpose (1) of paying his sick-bed and funeral expenses, and of all his just and lawful debts owing at the time of his death; (2) of investing a certain sum for behoof of his daughter; and (3) of paying over the residue to his family. Within a month after the death of the truster, the trustees, although aware of the existence of debts affecting the estate, proceeded, without notice to the creditors, to make arrangements for carrying out the second and third purposes of the trust; and in so doing, handed over to two sons of the truster, who were also trustees, £4000 of the trust money, receiving from them an heritable security in favour of the daughter. The money was allowed to remain in their hands for a period of eight years, when they became bankrupt. The trustees having thereafter raised a process of multiplepoinding and exoneration, lodged a condescendence of the fund *in medio*, in which they took credit for this payment of £4000. This was objected to by the creditors of the deceased, on the twofold ground that trustees were not entitled to lend the trust funds to any of their own number, and that till the creditors were satisfied the trustees were not *in titulo* to pay the family provisions. The Lord Ordinary (Ardmillan) gave effect to these objections, and the Court (First Division), on advising a reclaiming note, substantially adhered, the case being remitted to his Lordship 'to open up the record on the fund *in medio*, and to appoint the raisers to give in a condescendence, setting forth on the one hand the whole of the trust estate and effects which were conveyed to them by the trust settlement of the late John Salmon, and on the other hand, to what extent and in what manner the same have been dis-

that a tutor cannot lend to a pupil must be understood in a reasonable sense. Where the pupil has no funds, the tutor may advance them to carry on the management, and may claim reimbursement of these advances when the accounting comes (*a*).

Assignations and leases in favour of the tutor.

The tutor cannot assign the rents of the pupil's estate for payment of his own debts (*b*). Nor can he give up a lease of his ward's in order to acquire it himself. Thus, where there were two years of the pupil's lease to run, he renounced it, and took another lease in his own name, at an advanced rent of £20. This sum, during the two years of the former lease, he became bound to pay to the pupils. When there were four years of this second lease to run, and while the children were still under his care, he obtained another lease for thirteen years, on his agreeing to pay an additional rent of £30. The tutor having acquired in this way a fortune of several thousand pounds, the pupils brought an action for obliging him to communicate to them the profits arising from these leases. The Court 'found that the defender was obliged to account to the pursuers for the profits arising from the farm in question, during the two years which were not run of their father's lease at the time of his death, and also during the remaining thirteen years of the first tack, and during the whole years of the second tack obtained by him' (*c*). Here it was found, that if the tutor, with a view to his own emolument, enters into transactions into which it was admitted he would not have been bound to enter for the benefit of his pupil, and the loss upon which he could not have laid upon the pupil, yet he must, in case profits are made, communicate these. It was granted, that even supposing the tutor in this case had been bound to become overseer of the farm during the two years that the lease was current, for the benefit of the pupils, he would not have been obliged to take a new lease for them at an advanced rent at the expiry of the old one (*d*). If he had done so, the

posed of, and to what extent, if any, the same still remain undisposed of.' The case was subsequently compromised.

(*a*) *Infra*, Part i. Div. iii. s. ii.

(*b*) *Lands* v. *Douglas*, M. 16250, and 1 Sup. 173 (1629); Ersk. *ibid.*

(*c*) *Wilson* v. *Wilson*, M. 16376; Hailes, p. 1069 (1789). See Lord Cowan's observations in *Cochrane* v. *Black*, 1 Feb. 1854, 17 D. 337.

(*d*) An opinion in consonance with that of the judges in a former case, when the subject of the lease was of a precarious nature. *Parkhill* v. *Chalmers*, M. 16365, and see Bankt. i. 7, 36.

hazard of the transaction would have been laid upon himself; and therefore, if he had removed from the farm and allowed a third party to take a new lease, it is thought that there could not have been any claim against him for mismanagement or want of proper diligence. But having unwarrantably acted *in rem suam*, by taking a lease to himself of that farm which was leased by the pupils, he was held bound to account for the profits, not merely during the remaining two years of the original lease, but during all the years of both the first and second tack taken in his own name. It is impossible to imagine a case more strongly illustrative of the utter repugnance of the law to a tutor making profit, directly or indirectly, through his knowledge of, or interference with, the affairs of the minor.

Another strong illustration of the rule will be found in a decision, where a father acted as administrator-in-law for his infant child, who had, in virtue of an entail, acquired right to an estate. The father for some years drew the rents as administrator-in-law; but thereafter, in 1809, he served himself heir to the proprietor last infeft, enjoyed the estates for a number of years as absolute owner, and even sold parts of it. On the child's arrival at majority he raised action against his father for the amount of his intromissions with the estate as administrator-in-law during the pursuer's minority. The Court held that it would require very particular precautions indeed, and proceedings of a singularly pure character, in which the pupil's interests were anxiously guarded by separate advisers, under the sanction of the Supreme Court, before the tutor could be permitted to allege that the estate committed to him as tutor was in reality his own; that any title so made up privately and extrajudicially must be held as intrinsically void and null, requiring no declarator or reduction to set it aside, at least where the interests of third parties are not concerned. The father was also compelled to account for the whole rents and profits drawn and consumed by him (*a*).

Where benefit to the tutor is remote or contingent.

Though the interest of the tutor in the deed were somewhat remote and contingent, yet this rule would strike against it; as, for example, if he should lend out the pupil's money, or what is

(*a*) *Bontine* v. *Graham*, 20 Dec. 1838, F. C., and 15 Nov. 1839, 1 D. 286 and 2 D. 27. See also opinions of judges in *Perston* v. *Perston's Trs.*, *supra*.

presumed his, upon a bond payable to the latter, with a substitution in favour of himself, this substitution would not take effect in favour of the tutor in prejudice of the heirs and representatives of the pupil (*a*).

Whether purchases by tutor are struck at when made by his own funds.

It was maintained by some lawyers, that 'profitable purchases made by tutors of rights upon or affecting their pupil's estate or of their debts, did not accresce to the pupil, unless the tutor *at the time of the purchase intus habuit* of his pupil's effects to make the purchase with' (*b*). But this doctrine Elchies held to be erroneous, on the ground that a tutor has a universal trust committed to him in all the affairs that concern the pupil or his estate, and not only may make profitable or reasonable bargains for him, but ought to act in all his affairs as a reasonable man would do in his own, 'and may even make bargains of hazard to relieve his estate;' and, therefore, if an abatement could be got of a debt due by a pupil upon ready money, or a beneficial purchase of a liferent, as a provident man, though he had no ready money of his own, would borrow for these purposes, the law would presume it to be done for the pupil's behoof; and, therefore, that it would accresce to the pupil, though the tutor *non intus habuit*. 'Tutors and their factors,' says Lord Stair, 'are presumed to do that to the behoof of the pupil which they ought to do; and though it be done *proprio nomine*, it accresceth to the pupil' (*c*). This doctrine has been confirmed by the House of Lords. A party under trust had granted a bond of annuity, which his trustee purchased from the person to whom it was granted. The cautioner in the bond brought a reduction to set aside the assignation, on the ground that the trustee could only acquire for the benefit of the trust estate. The cautioner offered payment of the sum paid for the assignation, but claimed the benefit of any additional value it had now attained. The House of Lords, reversing the judgment of the Court of Session, held that the trustee could not acquire an interest opposite to his ward's; and that he was bound to communicate to the cautioner any advantage that had accrued or might accrue on the

(*a*) *Tennent* v. *Tennent*, M. 16288 (1673).

(*b*) Elch. Annot. p. 37.

(*c*) Stair i. 6, 17; Craig i. 14, 13, and i. 15, 24; M'Ken. i. 7, 18; Ersk. i. 7, 19; 1 Domat, p. 272, No. 14.

transaction, and that he could not sue a charge on the bond so acquired for his own behoof (*a*).

Gifts to tutor over pupil's estate accresce to pupil.

It matters not whether the right acquired by the tutor against the pupil or his estate has been obtained gratuitously (*b*); and it is of no importance that the narrative of the deed declare that it is intended for the tutor personally, and given for love and favour of him, seeing that he could as easily get any narrative he pleased inserted in the deed, as the execution of the deed itself; and in this case the rule therefore holds, that the right was gifted to the pupil, though in name to the tutor (*c*).

Deeds indirectly benefiting the tutor. Buying up pupil's debts.

(2.) The cases which occur in this branch of law are not generally those direct acts, the injustice of which is easily discovered. Tutors endeavour, when engaged in the spoliation of their constituent, to shroud their actings under an apparent covering of good faith. Thus the debts due by the pupil are sometimes purchased in from the creditors at small sums,—the tutor knowing that the pupil's estate will pay in full, and which payment he claims against it. To put a stop to this, the law presumes, prior to accounting, that all these rights have been purchased with the pupil's money; and when the accounting shows this not to have been the fact, the tutor can claim no greater sum than what he actually paid for the debts he purchased in (*d*).

Deeds in favour of tutor's relatives annulled.

As the efficacy of the rule would be completely defeated, if its operation were confined merely to deeds in favour of tutors themselves, the law has denied effect to deeds in favour of the tutor's children or his wife. A tutor assigned away his pupil's tack to his son, which the Court set aside without reduction (*e*); and a minor having granted a bill to his stepmother, he suspended a charge on it, on the ground that the bill was truly granted to his father, his administrator-in-law, belonged to him *jure mariti*, and was null.

(*a*) *Wright* v. *Hamilton*, 26 Feb. 1839; revd. 2 Aug. 1842, 1 Bell's App. 574.

(*b*) Stair i. 6, 17; Bankt. i. 7, 39; Ersk. i. 7, 19; *Cochran* v. *Cochran*, M. 16339 (1732); Elchies' Annot. p. 38; *Thoirs* v. *Tolquhoun*, M. 16308 (1686), a right acquired by a pro-tutor.

(*c*) Stair i. 6, 17.

(*d*) Craig i. 14, 13; Stair i. 6, 17; Ersk. i. 7, 19; Kames' Equity, p. 375. *Melville* v. *Montgomery*, M. 16292 (1676); *Dewar* v. *Dewar*, M. 16241 (1619); *Touch* v. *Seaton*, M. 16278 (1666); *Winton* v. *Ramsay*, Mor. 9977 and 11523 (1626).

(*e*) *Sanquhar* v. *Crichton*, M. 16233 (1583). See also *Ludquhairn* v. *Haddo*, M. 16260 (1632); *Brown* v. *Burt*, 23 Dec. 1848, 11 D. 338.

The Court held, that as the father did not prove the contents of the note to have been *in rem versum*, the minor was not liable, although married and *proximus majorennitati* (*a*).

Rule applies to tutors and curators of all kinds.

(3.) The rule applies to all guardians whatever; to fathers as well as to ordinary tutors (*b*), to curators (*c*), to pro-tutors (*d*), nay even to rights acquired by the factor of the tutors (*e*). And it would also clearly apply to a factor *loco tutoris* (*f*). An illustration of the general principle is presented by a case in which persons in the position of agents and trustees for an absent party, who was heritable creditor over house property in Glasgow, brought the property to sale under the bond, and purchased it in, in name of a third person, applying the price in extinction of their own accounts against their client, without giving him information about it. The transaction was set aside when challenged at the distance of thirty years; and though the property was then much improved in value, their representatives were ordained to convey it over to the pursuer (*g*).

The rule is even carried further. It may be competently urged against the onerous assignees, creditors, or other singular successors of tutors, who cannot take a right from them, without being subject to all the objections with which it is charged; and therefore such singular successors cannot insist upon their assignations, or other deeds they have acquired, until the tutor account (*h*). In such cases, however, it would seem that the pupil can only get redress by reduction (*i*).

(*a*) *Anderson* v. *Cation*, 28 Nov. 1828, and 15 Nov. 1832, 11 S. 10.

(*b*) Dig. xxvi. 8, 7, 2; *Lands* v. *Douglas*, M. 16250, 1 Sup. 173 (1629); *Crawford* v. *Canongate*, M. 16315 (1694); *M'Kenzie* v. *Fairholm*, M. 16278 and 8959, and 1 Sup. 530 (1666); *M'Neill* v. *M'Neill*, M. 16229 (1564); *Graham* v. *Bontine*, 20 Dec. 1838, and 15 Nov. 1839, 1 D. 286.

(*c*) *M'Kenzie* v. *Fairholm*, *supra*; *Thomson* v. *Pagan*, M. 8985 (1781). See *infra*, Part ii. chap. 3 (iii.).

(*d*) *Tolquhoun* v. *Thoirs*, M. 16305 (1683). But see *M'Alexander* v. *M'Alexander*, M. 16293 (1677); *Cockburn* v. *Oxford*, M. 16294 (1677).

(*e*) Stair i. 6, 17; *Edmonston* v. *Edmonston*, M. 16264 (1635). See *Dory* v. *Guthrie*, 4 Sup. 47 (1693).

(*f*) See *Elphinstone* v. *Robertson*, 28 May 1814, F. C.

(*g*) *Gillies* v. *M'Lachlan's Reps.*, 11 Feb. 1846, 8 D. 487.

(*h*) Stair iii. 1, 22; *M'Dougal* v. *Applecross*, M. 16308 (1686); *Ramsay* v. *Winton*, M. 9977 and 11523 (1662); *Dewar* v. *Dewar*, M. 16241 (1619); *Campbell* v. *Dougall*, M. 16279 (1667); *Spence* v. *Scot*, M. 9981 (1676); *Cleland* v. *Bailie*, M. 9983 and 12451 (1679); *Brebner* v. *Cook*, M. 9998 (1714); *Grant* v. *Grant*, M. 11497 (1662).

(*i*) See Lord Cuninghame's note in *Graham* v. *Bontine*, 20 Dec. 1838, 1 D. 286.

The rule holds only till accounting.

(4.) The presumption of law, that rights affecting the pupil's estate have been purchased with the pupil's money, and belong to him, or that money lent by the tutor to the pupil was the latter's own money, only holds until a final accounting between the parties,—when it may be redargued. If it can be then shown that the right purchased could not have been so with the pupil's money, the tutor or his assignee will be allowed to retain the right he has acquired, unless the pupil repay him what he disbursed for the purchase or the money he has lent (*a*). But rights obtained by the tutor gratuitously, affecting the pupil's estate, are held, whatever be the narrative of the deed of gift, to have been *presumptione juris et de jure* gifts to the pupil (*b*). Where it is established on accounting that the right is purchased with the tutor's own money, he must, notwithstanding, give the pupil the benefit of any ease or deduction he obtained from the creditor in buying the right (*c*).

Further, although a tutor is not bound to account after the decennial prescription of tutorial accounts, yet he cannot claim payment of a debt due by the minor, and acquired by him during the tutory, even after that period, unless he account, because the debt is presumed to have been acquired by the minor's money, and therefore accrued to him at the very acquisition; and the money paid for it could only be charged in the accounts, as advanced for the minor (*d*).

Exceptions to the rule, that deeds in favour of tutor accresce to pupil.

(5.) To the general rule, that a tutor cannot be *auctor in rem suam*, there are exceptions. If the advantage to the tutor be merely incidental and consequential, while a third party, not a relative of the tutor, is the direct recipient of benefit from the deed, it will be sustained (*e*). Thus, a tutor may do what is necessary towards the acquiring an inheritance to the pupil, though the pupil should, by acquiring it, become bound to pay a legacy to the tutor, upon the condition of payment of which it was left (*f*). In like manner,

(*a*) Contrast Elchies' Annot. p. 37, with Bayne's Notes, p. 31; *Ramsay* v. *Winton*, M. 9977 and 11523 (1662), and other cases just cited. See also, as to accounting, *infra*, Part i. Div. iii. sec. ii.

(*b*) *Supra*, p. 290; Stair i. 6, 17; Ersk. i. 7, 19.

(*c*) *Thoirs* v. *Tolquhoun*, M. 16308 (1686); Ersk. i. 7, 19.

(*d*) *Douglas* v. *Scott*, Elch. *v.* Tutors 8 (1737); Bankt. i. 7, 45.

(*e*) Dig. xxvi. 8, 7, Pr.; *Carstairs* v. *Moncrieff*, M. 8962 and 16286 (1672).

(*f*) Dig. xxvi. 8, 1, Pr.; Dig. xxvi. 8, 7, Pr.

where the suspicion of fraud cannot so easily arise as when there are more tutors than one, any deed granted by a quorum of tutors in favour of a co-tutor who does not concur in it—in implement of obligations arising in favour of the co-tutor against the pupil independent of the tutory—will be valid, although it may afterwards be reduced on the head of lesion (*a*). So also, where one of several tutors has an adverse interest to the pupil, he may, even during the subsistence of the tutory, raise action against him; and where he has to pay provisions to the pupil, he may receive a discharge from the co-tutors, which can only be reduced on the ground of lesion. 'If one of the tutors or curators, or one of the trustees, were *aliunde*, and, apart from the administration of the trust, involved in some litigation or question in which the trust was concerned, I do not say that where it was necessary or highly expedient so to deal with it, it might not be proper to keep aloof the party in that predicament, and to let the others conduct the settlement or compromise of their rights with him, in such a manner as would not be objectionable if done in *bona fide*. This might be a good transaction, it being necessary to deal with the matter in some way, and there being there no dereliction of duty on the part of the trustee who is the opposite contracting party, because his position is one not arising voluntarily out of the trust, but independently of it' (*b*). 'It is no doubt perfectly true, that occasions may arise when it is impossible to prevent transactions between one of the trustees as an individual, and the rest of the trustees as representing the trust estate. That must always occur where any of the trustees are beneficiaries under the trust; because, in settling with the trustees in regard to their own beneficial interest under the trust, they are maintaining their own individual interest necessarily, and acting to a certain extent adversely to the general body of trustees and to the trust estate. It is very easy to figure other cases where the trust must be left in the hands of a quorum of the trustees, and where the remaining trustees may be acting adversely to the trust and the trust estate; as, for example, where rights come to individual trustees by inheritance or marriage

(*a*) Dig. xxvi. 8, 5, Pr.; Craig ii. 20, 15; Balf. p. 118, No. 123; Stair i. 6, 17; Erak. i. 7, 19. *Duncanson* v. *Duncanson*, M. 8928 (1715); *Whitefood* v. *Calderwood*, M. 386 (1619); *Stonyhill* v. *her Son*, M. 16245 (1625).

(*b*) *Per* Lord Neaves in *Perston* v. *Perston's Trs.*, *supra*.

after they have accepted the office of trustee. They cannot be expected to reject such successions, merely for the purpose of enabling them rightly to perform their duties as trustees; and just as little, on the other hand, are they entitled to resign their office of trustees, merely because they have succeeded to such a right as may bring them in one particular case into a position of antagonism to the trust estate and its interests. But it is only where these necessities arise, that the withdrawal of any trustees from taking a part in the trust management, and from giving the full benefit of their assistance to the other trustees, can be justified' (*a*).

But if there be not a quorum without the tutor in whose favour the deed is to be granted, or an adjudication led, it cannot be executed or carried through at all, except with the special authority of the Court. And 'if it were otherwise,' says Erskine, 'a tutor, through his knowledge of the minor's affairs, and concealing them from others, might raise to himself a fortune by such purchases at his ward's cost' (*b*). In some peculiar cases, the Court have allowed the tutor to adjudge for payment of debts acquired *during the tutory* by him against the pupil, upon his finding caution to repeat, should it turn out on accounting that he had money in his hands to pay (*c*). Stair refers to these cases, when he says, 'Neither hath the tutor *ordinarily* action against the pupil till his office end' (*d*). In one case, upon strong allegations that the assignation obtained by the tutor could not have been purchased with the pupil's funds, the Court refused to enforce the rule of law, even before accounting, and allowed a proof, which established that the pupil's estate was heavily burdened at the time, and about to be torn by diligence, when the tutor, *while holding office*, advanced money to pay the most clamorous of the creditors. The ordinary presumption was here allowed to be overcome, and decree was pronounced in favour of the tutor (*e*). The authority of this

(*a*) *Per* Lord Justice-Clerk (Inglis), *ibid.*

(*b*) Ersk. i. 7, 19; Bell's Prin. 2086.

(*c*) Bankt. i. 7, 40 *in fin.*; *Ramsay* v. *Winton*, M. 11523 and 16267 (1662); *Grierson* v. *Carruthers*, reported in *Nisbet* v. *Smith*, 3 Sup. 594; *Weir* v. *Arnot*, M. 16266 (1636).

(*d*) Stair i. 6, 17.

(*e*) *Buchanan* v. *Buchanan*, M. 16363 and 11676 (1765). Bayne's Notes, p. 31.

decision may be doubted (*a*). In a later case, however, the plea that a bill was granted by the minor to his father, his administrator-in-law, for money *in rem versum* of the minor, was held relevant; but the facts not supporting the plea, the bill was declared null (*b*). The Court would, however, without doubt, allow the tutor to institute an action against the pupil for recovery of a debt due *before the office commenced*, but they would appoint a curator *ad litem* to attend to the pupil's interest in the management of the cause (*c*). Or they would sanction any appropriation of the pupil's funds to the liquidation of such a debt, because in regard to it there is no distinction to be made between the tutor and any other creditor; and no peculiar presumption of law can, in such case, come into play against the tutor's just claim (*d*).

Who may found upon the objection.

The objection that a tutor cannot be *auctor in rem suam* cannot be advanced by a third party not deriving right from the pupil. A tutrix acquired a renewal of a lease formerly held by her son, the pupil, and which, on the authority of the case of *Wilson* (*e*), would have been found to belong to him. The landlord being an heir of entail, incurred an irritancy; and as the renewed lease had not commenced at the time of the irritancy, the succeeding heir of entail refused to recognise it. The tutrix, in consequence, brought an action of damages against the landlord who had let to her, for the loss she had sustained. The defender pleaded that she 'had no title to prosecute the action, seeing that it was incompetent for her to acquire any renewal of the lease except for her son's behoof.' But the Court repelled this defence, holding the objection personal to the pupil, and found damages due (*f*). The rule, however, is different with regard to the pupil's onerous creditors, who are entitled to state the objection not only against the tutor himself, but also against his singular successors (*g*).

(*a*) Elch. Annot. p. 37. See Ersk. i. 7, 19.

(*b*) *Anderson* v. *Anderson or Cation*, 15 Nov. 1832, 11 S. 10.

(*c*) *Donaldson* v. ——, M. 16253 (1629); *M'Neill* v. *M'Neill*, M. 16229 (1564); Ersk. i. 7, 32; *Stonyhill* v. *her Son* (1625), M. 16245.

(*d*) *Dewar* v. *Dewar*, M. 16241 (1619); *M'Alexander* v. *M'Alexander*, M. 16293 (1677); *Muir* v. *Crawford*, 4 Sup. 298 (1696); *Ninewells* v. *Smith*, M. 16310 and 12081, and 3 Sup. 594 (1687). Balfour, p. 120; Dig. xxvi. 7, 9, 5, and also sec. 7.

(*e*) *Supra*, p. 287.

(*f*) *Downie* v. *Campbell*, 31 Jan. 1815, F. C.

(*g*) *M'Dougal* v. *Applecross*, M. 16308 (1686); *Lands* v. *Douglas*, 1 Sup. 173 (1629).

CHAPTER IV.

LIABILITIES OF TUTORS, AND DILIGENCE PRESTABLE BY THEM.

To understand the nature of the diligence prestable by tutors, it will be necessary shortly to explain the different kinds of diligence recognised in law.

Distinctions of *culpa* recognised by the civilians.

The law of diligence or *culpa* has been thoroughly and learnedly examined by the civilians (*a*); and the modern doctrine differs in one important particular from the rules laid down by the older civilians, and adopted by Scotch writers. In no part of the body of the civil law can there be pointed out, *in terminis*, the distinctions of *culpa* adopted in later times; but the commentators, in systematizing the law, considered themselves warranted in dividing *culpa* into three classes,—*culpa lata, culpa levis, culpa levissima.* The first was gross and glaring negligence (*crassa negligentia*), the doing things in the spirit of a too confiding security and supine ignorance; in short, acting in such a manner as even careless men are not accustomed to do. This *culpa* almost amounts to dole. *Lata culpa dolo æquiparata est* (*b*). *Culpa levis* is that kind of negligence which is best explained by its opposite, viz. the diligence employed by the prudent father of a family, soberly and provi-

(*a*) See a great number of the ancient authorities quoted in Jones on Bailments; Vinnius Com. ad Inst. iii. 15, 2, and Noodt, vol. i. pp. 30, 31; the Commentary of James Gothofred, in his minor works, pp. 798–822; P. H. Puffendorf, Treatise de Culpa (1741); and above all, the work of a modern German civilian (J. Ch. Hasse), intituled 'The Culpa of the Roman Law' (Die Culpa des Römischen Rechts), published at Kiel in 1815, 8vo. This learned work has superseded all others on this subject. Warnkönig, vol. ii. p. 13. See also Toullier, Droit Civile, vol. vi. Nos. 223–237.

(*b*) Dig. l. 16, 226; Dig. xlviii. 8, 7; Dig. xlvii. 4, 1, s. 2.

dently administering his own affairs (*a*). *Culpa levissima*, these authors explained to be the slightest fault, and implied that the person liable was bound to the extremest vigilance, and rendered responsible for every neglect.

This classification of the law of *culpa* is sanctioned by eminent civilians,—by those especially who are quoted as authorities by Scotch writers, and in the Scotch courts (*b*); and the same division was, on their authority, adopted by Scotch lawyers (*c*). Later dissertations have, however, established that there is no foundation in the Roman law for such a diligence as is implied in *culpa levissima*. It is maintained, that in so far as regards this *culpa*, the above classification is erroneous and inconsistent with sound principle; and upon a rigid and philosophical analysis of the nature of contracts, modern writers hold that it can be implied in none of them, and have in consequence rejected it: for neither the ordinary commerce of mankind, from which the greater part of obligations take their origin, nor natural equity, demands that any one should be obliged to employ extreme labour, or unusual skill, or such care and diligence which men of rarest genius, or persons agitated with perpetual anxiety, can alone bestow (*d*). Though the result of the tutor's *bona fide* labours should therefore turn out unfortunate, he is not in any case liable for the loss (*e*). *Sufficit tutori bene et diligenter negotia gessisse, etsi eventum adversum habuit, quod gestum est* (*f*).

Culpa levissima not recognised in law.

Though *culpa levissima* is thus altogether rejected, as being without warrant in authority, and at variance with principle, a division has been made with regard to *culpa levis*, that will tend much to give precision to language in the statement of the diligence

Two kinds of *culpa levis*.

(*a*) See illustrations of this, Dig. ix. 2, 31; Dig. xiii. 6, 18, Pr.; Dig. xviii. 6, 11; Dig. xix. 2, 25, 7; Dig. xlv. 1, 137, 2; Hasse, secs. 13, 16, 42; 2 Warnkönig, Com. p. 17.

(*b*) Vinn. Com. Inst. iii. 15, 2; Heinec. Pandect. Pars iii. sec. 116.

(*c*) Stair i. 11, 9, and i. 13, 2; More's Notes, pp. lxxi. lxxxv. xcv. *seq.*; Bankt. vol. i. p. 469; Ersk. iii. 1, 21; 1 Bell's Com. 453; Bell's Prin. 233, 234; Bell's Dict. *v.* Culpa lata.

(*d*) 'Nam nec vulgare hominum commercium, ex quo longe plurimæ obligationes originem sumunt, nec naturalis equitas poposcit, ut quis nimium laborem aut insolitissimam dexteritatem præstet, aut talem curam et prudentiam, quam rarioris ingenii viri aut perpetua anxietate agitati homines impendere possint.'—Warnk. Com. vol. ii. p. 18. Lord Mackenzie's Roman Law, p. 186 *seq.*

(*e*) Code v. 38, 4.

(*f*) Dig. xxvii. 4, 3, 7.

prestable by parties. There are two kinds of *culpa levis:* one, where an individual is liable only for all faults or negligence which it can be shown would not happen in the management of *his own* affairs; the other, where he is liable for faults or negligence which cannot be proved to happen in the management of his affairs by *a prudent man—providens paterfamilias.* The former is called *culpa levis in concreto,* because the criterion is fixed and individualized, viz. one's own management; the other, *culpa levis in abstracto,* because the criterion is a prudent man in the abstract (*a*).

Degrees of diligence incumbent on tutors.

On account of the great trust implied in tutory, and the defenceless condition of the minor, tutors and curators are liable in a higher degree of diligence than any other parties who give their services for nothing. In any other case of gratuitous service, the party by whom diligence is prestable would be liable only for *culpa lata* (*b*). But even with regard to tutors and curators there are degrees of liability: some are liable for *culpa levis in concreto,* others for *culpa levis in abstracto,* and others for *culpa lata* only. The first are tutors-testamentar, the second tutors-dative and at law, and the last are fathers as administrators-in-law. The reason for the distinction between the two first is, that tutors-testamentar accept the office at the entreaty of the father of the minor, whereas tutors-at-law and dative ultroneously seek it. The former (tutors-testamentar), therefore, are liable only in the same kind of diligence as they observe in the management of their own affairs; and however negligent this may be, they will be discharged on proving that they did not use a less diligence in the pupil's. But tutors-dative and at law are liable for that exact diligence which it can be shown prudent men employ in the discharge of their duties, which obviously may be far more strict and rigid than the diligence employed by them in their own affairs, and therefore more onerous than that incumbent on tutors-testamentar (*c*). Under the Pupils' Protection

(*a*) 'Hodierni,' says Warnkönig, 'eos, *pro culpa levi in concreto* obligatos esse dicunt, quoniam diligentiæ gradus non ad exemplum diligentis patrisfamilias, sed ad normam agendi, ab ipso debitore servari solitam dijudicari et definiri debeant. Recte itaque dicitur, eum, qui diligentiam in suis rebus consuetam adhibere adstrictus est, pro levi quidem culpa teneri, sed excusari probando; se in propriis rebus eandem negligentiam admittere solere, si modo culpa dolo proxima careat.'—Warnkönig, Com. vol. ii. p. 19. Hein. Com. Inst. sec. 787.

(*b*) See Bockleman, Com. Dig. vol. ii. p. 233; Bell's Prin. secs. 233, 234.

(*c*) Stair i. 6, 21; Bayne's Notes,

Act, the Accountant of Court is required to audit the annual accounts submitted by tutors-at-law and tutors-dative, on the principle of good ordinary management, for the real benefit of the estate, and of those interested therein.

The distinction between the diligence prestable by tutors is plainly traceable to the Roman law, by which the liabilities of tutors were different, according as they were compelled to accept the office, or ultroneously forced themselves into it (*a*). On the other hand, fathers are not liable, except for *culpa lata;* because, on account of the nearness of connection between them and their own children, the law has considered it unnecessary to guard the interests of the minors, by imposing any rigid liabilities upon the guardian (*b*). A tutor is only liable in diligence from the time he accepts, and not from the time he might have accepted; and though loss might be incurred in the interval between the father's death and the time when the tutor accepted, he is not liable therefor (*c*).

Liability for omissions.

Tutors and curators are liable for omissions as well as intromissions; that is, they are liable for all the loss and damage that may follow from having omitted to do an act which they were bound to perform, as well as for having done anything improperly. There have been many cases illustrative of this general doctrine (*d*). The principal cases which form illustrations of the rule are,

p. 36; Ersk. i. 7, 26. But see More's footnote to Stair i. 6, 21.

(*a*) Contrast Dig. xxvi. 7, 32, secs. 6, 7, and Dig. xxvii. 3, 1, Pr., with Dig. xlvii. 2, 53, 3; 2 Bockleman, Com. p. 233; 3 Warnk. p. 173.

(*b*) Stair i. 5, 12; Bayne, p. 35; Ersk. i. 6, 55, and i. 7, 26.

(*c*) Ersk. i. 7, 20; *Muir* v. *Crawford*, M. 16316 (1697); *Scrimgeour* v. *Wedderburn*, M. 16282, Gosford's Report (1670). See *Cass* v. *Eleis*, M. 16285 (1671).

(*d*) Stair i. 6, 21 and 22; Ersk. i. 7, 26 and 27; Bankt. i. 7, 37. *Kintore* v. *Logan*, 1 Sup. 512 (1665); *Cleland* v. *Lamington* (1680), M. 12451 and 9983; *Hunter* v. *Wilson* (1612), M. 14693; *Burnet* v. *Burnet* (1675), M. 14696; *Lockhart* v. *Elies* (1682), M. 504; *Sinclair* v. *Sinclair* (1686), M. 14696; *Murrays* v. *Murray*, 30 May 1833, 11 S. 663. See also *Thomson* v. *Christie*, 24 Nov. 1849, 12 D. 179, H. of L. 16 June 1852, 1 Macq. 236; and *Forsyth's Factory*, 1 Feb. 1853, 2 Stu. 187, and 15 D. 345; 1 Domat, p. 269, No. 1. These texts from the Roman law show how it was applied in that system. In omnibus quæ fecit tutor, cum facere non deberet, item in his quæ non fecit, rationem reddet hoc judicio; præstando dolum, culpam, et quantam in suis rebus diligentiam.—Dig. xxvii. 3, 1, Pr. Ex quo scit se tutorem datum, si cesset tutor, suo periculo cessat.—Dig. xxvi. 7, 1, 1. Code v. 28, 6.

omissions on the tutor's part to recover rents and debts due to his ward. This subject has been already considered (*a*); although it may be again repeated here, that in general the tutor is liable for such omissions; that the debtor's solvency is presumed; but that it is competent for the tutor to show that he was insolvent, or, having been reputed solvent, had suddenly failed, and that it would have been a useless waste of the pupil's money to have pursued him. There are other qualifications to the general rule (*b*).

There are two other species of omission also illustrated by decisions. Where certain female pupils, being provided, under a contract of marriage, to lands in which the previous investiture was in favour of heirs-male, and no infeftment having been obtained, in terms of the new destination, the tutor was found liable in damages for not having raised inhibition on the contract against the heir-male; and he was ordained to obtain a disposition from his brother, the heir-male, in favour of the pupils (*c*). And the curators of a female minor, having neglected to secure her by infeftment in the jointure provided to her by contract of marriage, were held liable in the loss and damage she sustained by their omission (*d*). A bond produced by the pupil in accounting with the tutor, and lost by the insolvency of the debtor, was ordered to be paid by the tutor, though he averred that he was ignorant of its existence. He was required to prove that he had searched the charter-chest and found not this bond (*e*). So, in another case, the ward had been possessed of a farm and mill, from which, by gross neglect or wilful abuse of trust, the tutors allowed her to be removed by not paying up the rents, and so creating an arrear, which the landlord took advantage of to irritate the lease. The Court of Session found the ward entitled to recover from the tutors, *singuli in solidum*, the full damages which she could qualify to have sustained by the want of the mill and farm for so many years. And their judgment was affirmed on appeal (*f*).

(*a*) *Supra*, p. 229.

(*b*) *Supra*, *ibid.*

(*c*) *Fergusons* v. *Ferguson*, M. 16292 (1677).

(*d*) *Gray* v. *Gordon*, 4 Sup. 188 (1694).

(*e*) *Cleland* v. *Lamington*, M. 9984 (1680), Fountainhall's Report.

(*f*) *Duff* v. *Henderson* or *Young*, M. 16375 (1788), and 7 Feb. 1793, in House of Lords, 3 Paton's App. 283. In this case the tutors had not made up inventories. It was a very bad case. See Lord Chancellor Thurlow's observations, Paton, p. 287.

It is not every omission which will subject in liability for loss. Thus trustees, who had been appointed in room of others who had acted for a number of years under a marriage contract, were not found liable for the loss of certain policies of insurance assigned by the marriage contract, it being alleged that the loss arose through their omission to see whether the original trustees had attended to the intimation to the insurance company of the assignation (*a*). If trustees or tutors, in paying over funds, take all the usual precautions, they will not be liable for loss through their omission to do more than a prudent man in the administration of his own affairs would do (*b*). But, on the other hand, if they fail to take those ordinary precautions which prudence dictates,—as, for instance, if, in making an investment, they are satisfied with a valuation furnished by the borrower,—the omission to make full inquiry for themselves furnishes a clear ground for imposing liability for the loss upon them (*c*). The large powers of supervision given to the Accountant of Court in the case of tutors-at-law and tutors-dative, together with the annual audit of their accounts, and the provision for the opening up of this audit on cause shown, either at the termination of the tutory or during its subsistence, on the application of parties beneficially interested in the estate or of any succeeding tutor, afford good security for the proper management of the estate under their charge (*d*).

Tutor's liability for intromissions.

The intromissions of the tutor must be such as lie within his powers of administration. They must be carried into effect with sound discretion; and although they may not have been the best that could have been adopted in the circumstances, yet they will be sustained if they have been dictated by prudence and a due regard to the pupil's interest.

This is the general doctrine—vague and indefinite as it is—which can alone be deduced from the decisions. There are various illustrations of it. Thus, a case is reported by Tait in these terms:

(*a*) *Scott* v. *Gray*, 26 Nov. 1862, 1 Macph. 57.

(*b*) *Stevenson's Trs.* v. *Dumbreck*, 18 Feb. 1857, 19 D. 462; *Miller's Trs.* v. *Miller*, 23 Feb. 1848, 10 D. 765.

(*c*) *Murrays* v. *Murray*, 30 May 1833, 11 S. 663; *Thomson* v. *Christie*, House of Lords, 16 June 1852, 1 Macq. 236, particularly the Lord Chancellor's speech; *Forsyth's Factory*, 1 Feb. 1853, 2 Stu. 187.

(*d*) 12 and 13 Vict. c. 51, ss. 13–15, 17–20.

'Tutors and curators are accountable for insolvencies while they are in office, if culpable neglect can be imputed to them, but not for unforeseen or sudden disasters happening even then. So found 1769, *Gib* v. *Gib*. The case here was, that a tutor having received payment of an heritable debt, due to the minor from a debtor, who offered it, lodged it with Messrs Fairholmes, bankers, at that time in good credit: it was found that their failure nine months after did not make the tutor liable' (*a*). In another case, a person, who had been curator to a man who was weak in intellect, continued to administer his affairs after the curatory was ended, and lent out the whole funds (previously well secured), upon personal security, to a shopkeeper who dealt in smuggling. The shopkeeper became bankrupt; and the Court of Session and the House of Lords held the *negotiorum gestor* liable for the loss (*b*).

In another case, the tutors had allowed their agent to keep possession of £1500 of the minor's funds, and took, as security for it, an assignation to a bond over property not nearly of that value. The agent became bankrupt, and the pupils having sued the tutors to account, it was found that the loss must be made up by them. The Court held that the security was *ex facie* inadequate, if not worthless; and it was an act of gross negligence to allow the agent to apply so large a sum to his own purposes, without an opinion from a professional person that the security he offered was safe. It was no excuse that this arose from ignorance, for if that plea were admitted, the interest of no pupil would be safe; and however hard the case of the tutors might be, that of the minors would be harder if they were not kept *indemnis* (*c*). A case, similar to this, shortly afterwards occurred with reference to trustees. There were two; and the truster, before he died, had lent £2000 upon the personal security of one of them. He directed them to uplift his debts, divide the residue, and he exempted them from liability for omissions. The two trustees, by a minute, agreed to allow the £2000 to remain in the hands of that one to whom it was lent; and in order to carry on the trust they borrowed money. On the

(*a*) *Gib* v. *Gib*, M. 16363, 5 Sup. 632 (1769).

(*b*) *Maul* v. *Graham*, M. 3529, affirmed (1757).

(*c*) *Murrays* v. *Murray*, 30 May 1833, 11 S. 663.

failure of the trustee who had borrowed the £2000, the Court found the other liable for that sum, which they regarded as being improperly left on personal security (*a*). And so, a co-trustee having concurred with a husband and wife, the only other trustees under a marriage contract, to uplift and discharge an heritable bond for £3000, which was paid to the husband, the judicial factor on his estate was found after his death to have a good title to sue the husband for reinvestment of the £3000, the whole proceedings being characterized as grossly illegal and improper, and imposing a clear liability to personal responsibility as against all the trustees (*b*). Where, however, the uplifting of funds is done with a view to a distribution of the estate, and with the knowledge of the beneficiaries, trustees are not liable for loss thereafter arising in the hands of a co-trustee, who was charged with the duty of distributing it, and whom the beneficiaries could have compelled to pay (*c*).

Liability *in solidum.*

By the strict principle of the Roman law, tutors were liable *singuli in solidum* (*d*); but at a later period, the equity of the prætors introduced the benefit of division (*beneficium divisionis*), and the privilege of being discussed in a certain order (*beneficium ordinis*). By the first, one, out of a number of solvent tutors, was only liable for his own share in the same manner as cautioners (*e*). By the second, that tutor was primarily liable who intromitted with the pupil's property (*f*). Although, in many of the older cases in our law, these privileges were attempted to be obtained on the authority of the Roman law, yet the Court refused to sanction the doctrine. The liability of the tutors *in solidum* was not, however, established at once. At first, the pupil could not pursue any one of the tutors, except for a share corresponding to their number; and if he alleged further intromission on the part of any one of them, he required to prove it before he could insist for any increase of

(*a*) *Moffat* v. *Robertson*, 31 Jan. 1834, 12 S. 369. See Lord Corehouse's note in this case, which fully explains the law upon the subject.

(*b*) *Watson* v. *Crawcour*, 9 June 1843, 5 D. 1182. See particularly the terms of the Lord Ordinary's interlocutor. See also *Seton* v. *Dawson*, 18 Dec. 1841, 4 D. 310; *Ross* v. *Allan's Trs.*, 13 Nov. 1850, 13 D. 44.

(*c*) *Urquhart* v. *Brown*, 7 June 1843, 5 D. 1142.

(*d*) Dig. xxvi. 7, 55, Pr.; Code v. 52, 2, *de divid. tut.*

(*e*) Dig. xxvii. 3, 1, s. 11 and 12; 1 Domat, p. 275, No. 29.

(*f*) Code v. 52, 3.

liability (*a*). But finally, the rule was settled, that tutors in all cases should be liable *singuli in solidum*, and that any one of them may be pursued directly and immediately for the whole, even though he may not have intromitted, and although none of the rest be discussed. In short, they have not the benefit either of discussion or division (*b*).

Can one tutor compel a co-tutor to find caution?

To avert the consequences of this joint liability, it was attempted in several cases to secure tutors against the misconduct of their associates, by applying to the Court to compel them to find caution to keep the complainer free from liability for all acts done by the other tutors without his consent, otherwise to allow him to discharge the whole duties, he finding caution in similar terms. And in one case of this sort it was stated, in the application to the Court, that the other tutors 'did act without him, and did not acquaint him with their meetings, and did outvote him in the pupil's affairs to his detriment.' But 'the Lords found the libel not relevant, there being a competent remeid in law to the pursuer for removing the defenders as suspected tutors, if they did malverse' (*c*). In a prior case, a more equitable doctrine was recognised. It was found that curators who dissented from any act of management were not liable in the consequences of such deeds (*d*). But in a late case relative to trustees, Lord Wood observed, that if one trustee 'had continued to act, and had simply objected to particular parts of the management, without following up his objection by an application to the Court or otherwise, and which, notwithstanding his objection, were carried through by his co-trustees, the majority of them happening to take a different view of the matter, it is supposed that he would not thereby be relieved of all share of any liability which might ultimately arise from a shortcoming of funds, occasioned by the acts of management

(*a*) *Edgar* v. *Jackson*, M. 14693 (1612); *Hunter* v. *Wilson*, M. 14693 (1612).

(*b*) Stair i. 6, 23; M'Ken. i. 7, 19; Bayne's Notes, p. 36; Bankt. i. 7, 38; Ersk. i. 7, 27. *Hunter* v. *Wilson*, M. 14693 (1612); *Guthrie* v. *Guthrie*, (1630), M. 14640; *Davidson* v. *Jack*, M. 506 and 14694 (1634); *Burnet* v. *Burnet*, M. 14696 (1675); *Lockhart* v. *Elies*, M. 504 (1682); *Murray* v. *Murray*, 1 Feb. 1832, and 30 May 1833. Correct More's Notes, p. xxxviii.

(*c*) *Stirling* v. *Govan*, M. 16286 (1672); and see *A.* v. *B.*, M. 16286 (1672); Stair i. 6, 23; Bankt. i. 7, 34, overruling *Rutherford* v. *Drysdale*, M. 16262 (1632).

(*d*) *Scotstarvet* v. *Buccleugh*, M. 16266 (1642).

objected to, unless he could show that they were wrongful and unjustifiable acts' (*a*).

Tutor liable though he has not interfered in the management.

Wherever a tutor has accepted, he is liable *in solidum*, although he has lain by altogether, never intromitted with the estate, and allowed the other tutors to manage it. To plead that he has not acted, is to plead neglect of duty. The object of the rules imposing joint liability is, to compel tutors to keep a watch over the proceedings of each other, that so, by rendering them liable for any misconduct of a co-tutor, the minor's interest may be the better attended to. These doctrines have been often sanctioned (*b*).

The same doctrine was frequently recognised under the old law with regard to trustees, who were made liable after acceptance, whether they intromitted themselves, or allowed a co-trustee to manage the estate (*c*). By special statute this has lately been altered (*d*).

Action of relief by tutors *inter se*.

But notwithstanding this rule, there is an action of relief competent to tutors *inter se*, which in some measure takes off the weight of this joint liability. Among themselves, tutors are liable according to their *actual intromissions* (*e*). As a consequence of this right of relief, the tutor paying may demand an assignation of the minor's right, called in the Roman law *beneficium cedendarum actionum;* but he cannot use it against a co-tutor to a greater extent than for that tutor's own proportion of the sum due (*f*). Where the minor discharges one of a number of tutors,

(*a*) *Logan* v. *Meiklejohn*, 26 May 1843, 5 D. 1072.

(*b*) *Burnet* v. *Burnet*, M. 14696 (1675). See also *Kintore* v. *Logan*, 1 Sup. 512 (1665); *Hunter* v. *Wilson*, M. 14693 (1612); *Murray* v. *Murray*, 30 May 1833, 11 S. 663; Stair i. 6, 23; Ersk. i. 7, 27.

(*c*) *M'Clymont* v. *Hughes*, 14 Feb. 1827, 5 S. 346; *Kennedy* v. *Wightman*, 28 June 1827, 5 S. 852. See also *Watson* v. *Crawcour*, 9 June 1843, 5 D. 1182; *M'Millan* v. *Armstrong*, 6 Dec. 1848, 11 D. 191; *Ross* v. *Allan's Trs.*, 13 Nov. 1850, 13 D. 44.

(*d*) 24 and 25 Vict. c. 84.

(*e*) *Ross and Anderson* v. *Lockhart*, 24 June 1829, 1 Jur. 369; *Hunter* v. *Wilson*, M. 14693 (1612); *Burnet* v. *Burnet*, M. 14696 (1675); *Lockhart* v. *Elies*, M. 504 (1684); *Sinclair* v. *Sinclair*, M. 14696 (1686); *Guthrie* v. *Guthrie*, M. 14640 (1630). Bankt. i. 7, 38; M'Ken. i. 7, 19. There is a case reported by Monboddo (5 Sup. 782), which seems to deny the doctrine that tutors are liable *inter se* only according to their actual intromissions. But Elchies and Kilkerran (who also report it) say nothing on this point. *Hamilton* v. *Weir*, M. 16355, and Elch. *v.* Tutor, No. 19 (1751); Ersk. i. 7, 27.

(*f*) *Guthrie* v. *Guthrie*, M. 14640 (1630).

this is not a discharge to the rest, though all be liable *in solidum*, except in the case where it bears to be payment or satisfaction of the whole, and except in so far as it bars the right of relief against the tutor so discharged (*a*).

Exceptions from rule as to joint liability and for omissions.

There are exceptions to the rule that tutors are liable for omissions. Fathers, as administrators-in-law, are not so liable (*b*). Further, when a father, as already stated (*c*), does, in virtue of the Act 1696, c. 8, exempt tutors-testamentar from liability for omissions, or from being bound *singuli in solidum*, they are freed from such liabilities, with regard to all property administered by them, flowing from the father; the Act expressly limiting the father's dispensing power to such property, and leaving the common law to operate with regard to any separate estate (*d*). According to this dispensation, a tutor, it is said, is left at liberty to intromit with, and manage, any part of the pupil's estate he may fix on, and he is noways liable for the loss, although he neglect the rest (*e*). He loses this exemption by not making up inventory (*f*). It is unsettled whether any other than the father has power to make this exemption; and such clauses of exemption are strictly construed against the tutors. The tutors will not thereby stand excused for omitting an act obviously and undeniably necessary to fulfil the objects and intentions of the deed (*g*); but they will, if the omission be only the loss of a debt, which they failed to recover (*h*), or damage caused by the insolvency of a factor, from whom they neglected to take up the pupil's money (*i*).

Another exception will be found in the case, where a father divides the administration into parts, assigning to each tutor the particular duty he is to perform, and the particular portion of the

(*a*) *Seaton* v. *Seaton*, M. 3547 (1668), printed in Morrison as page 3557.

(*b*) Stair i. 5, 12; Ersk. i. 7, 26, and i. 6, 55.

(*c*) *Supra*, pp. 180, 181.

(*d*) Bankt. i. 7, 37; Ersk. i. 7, 27; Bell's Prin. 2072 and 2081.

(*e*) See Bruce's Tutor's Guide, p. 59.

(*f*) *Murray* v. *Murray*, 1 Feb. 1832; *supra*, p. 205.

(*g*) See *Moffat* v. *Robertson*, 31 Jan. 1834, 12 S. 369; *Mayne* v. *M'Keand*, 4 June 1835, 13 S. 870; *Blain* v. *Paterson*, 28 Jan. 1836, 14 S. 361; *Seton* v. *Dawson*, 18 Dec. 1841, 4 D. 310. See the observations of the Lord Chancellor in *Thomson* v. *Christie*, 16 June 1852, 1 Macq. 236; *Forsyth's Factory*, 28 Jan. 1853, 2 Stu. 187.

(*h*) *Fraser's Trs.* v. *Falconer*, 14 Dec. 1830, 9 S. 178.

(*i*) *Ainslie* v. *Henderson's Trs.*, 6 Feb. 1835, 13 S. 417.

estate allotted him to manage. Here the tutors have no connection with each other, and are not therefore involved in any joint liability (*a*). It is different, however, where this division of the administration is made, not by the father, but the tutors themselves; for although, in order to their own convenience, they might agree to portion out the management among them, yet this will have no effect on their common law responsibilities (*b*).

(*a*) Stair i. 6, 23; Ersk. i. 7, 27; 1 Domat, p. 275, No. 28.

(*b*) Dig. ii. 14, 25 and 26; Dig. xxvi. 7, 46, sec. 1 *et pen.*; Stair i. 6, 23.

DIVISION III.

TERMINATION OF TUTORY, AND CONSEQUENCES THEREOF.

SECTION I.

HOW THE OFFICE TERMINATES.

I. THE office of tutor comes to a close in a variety of modes:—1. By the pupil's arrival at puberty. 2. The death of the pupil or tutor. 3. The marriage of a female tutor. 4. The existence of a condition upon which the office is made to depend. 5. Resignation of the office made with consent of the Court. 6. Removal from office as suspect.

The pupil's arrival at puberty.

(1.) The tutory ends by the pupil's arrival at puberty, which in males is the age of fourteen, and in females twelve; and this rule holds with regard to each pupil successively, though there may be several of different ages, who consequently cannot attain to puberty at the same time (*a*). The father could not prolong the term of pupillarity (*b*).

Death of the tutor or pupil.

(2.) The office comes to a close by the death either of the guardian or the ward (*c*). Death, in this case, is not confined to natural, but includes also civil death; for if the tutor be banished, or outlawed, or incur any punishment whereby he is held in law to be civilly dead, he can no longer hold the office (*d*). A tutor 'was for certain crimes fugitive from the law, and denounced rebel,

(*a*) 1 Domat's Civil Law, p. 281; Stair i. 6, 24; Bankt. i. 7, 30; Ersk. i. 7, 29; Balf. p. 121, No. 136; *A.* v. *B.*, M. 16218 (1533).

(*b*) *Per* Lord Braxfield in *Graham* v. *Erskine*, Hailes, p. 860.

(*c*) Stair i. 6, 24; Bankt. i. 7, 30 and 32; Ersk. i. 7, 29.

(*d*) 1 Domat, p. 281, No. 6; Bankt. i. 7, 32; and Ersk. i. 7, 29, *2dly in med.*

and put to the horn,' and it was accordingly held that he had lost his office (*a*); and in another case, a father being 'denounced rebel by criminal letters, for not compearing to underly the law for a murder,' he was found to have forfeited his office of administrator to his child (*b*).

Where pupil is an outlaw.

With regard again to the *pupil's* civil death, it is settled that he may incur this penalty for crimes, and of course may be denounced an outlaw (*c*). But there are no decisions as to the effect of such *capitis diminutio* on the right of guardianship. His person would no doubt be removed from the custody of the tutor; but his property is not always, or even generally, entirely forfeited for his crimes. In the case of treason such is the case; in other cases, again, the single and liferent escheat only fall, that is, his moveables and the profits of his heritage are alone forfeited, while the fee of the latter remains in himself. In such circumstances, the office, it would appear, would subsist in the tutor, so as to allow him to manage the fee of the estate (*d*). Again, if the pupil were banished or imprisoned, and the property left untouched, as happens with the great majority of crimes, would the rights of guardians still remain (*e*)?

On tutor's death, his heir is not tutor.

On the tutor's death, his heir is not entitled to the office merely in consequence of his being heir. *Sciendum est nullam tutelam hereditario jure ad alium transire* (*f*). The proper course, in such circumstances, would be for the nearest agnate to serve tutor-at-law, or for the next of kin to obtain the appointment of a factor *loco tutoris* or a tutor-dative.

Marriage of tutor.

(3.) The marriage of a female tutor voids the office. This is a rule 'which no provision of the testator can dispense with' (*g*).

By the existence of a condition on which the office depends.

(4.) A tutor may be appointed to the office by the pupil's father conditionally; *e.g.* until the arrival of a certain day, the occurrence of a particular event, or some other similar contingency. In

(*a*) *Graham* v. *Dickson*, M. 16236 (1590).

(*b*) *Forbes* v. *Forbes*, M. 16287 (1673).

(*c*) Hume's Crim. Law, vol. ii. pp. 162 and 270.

(*d*) 1 Domat, p. 281, No. 6.

(*e*) See Fraser's Pers. and Dom. Rel. vol. i. pp. 259, 276, and 404, for the decisions on this subject as to Husband and Wife.

(*f*) Dig. xxvi. 1, 16, 1; Warnkönig, vol. iii. p. 211; Heinec. Com. Inst. No. 258.

(*g*) Stair i. 6, 24. See all the authorities on the point collected, *supra*, p. 171 (*k*).

all these cases the office terminates *ipso jure*, without the necessity of a declarator, and by the mere existence of the condition (*a*). Under this head come that very common class of conditional appointments, where a number of tutors are appointed jointly, or where a quorum or *sine quo non* is named. If any one in the first or second cases, or the *sine quo non* in the third, fail, the whole nomination is at an end. The rules on this subject have been already explained (*b*). When tutors-testamentar have been appointed without any express statement of their being joint, the nomination does not fall by the death of any one, or the majority of the whole; but it subsists in the survivor or survivors as validly as in the whole (*c*). It has been already seen, that a different rule holds as to tutors-dative (*d*).

Resignation of the office by the tutor.

(5.) A tutor, after having accepted office, is, it would seem, entitled to resign it, if he do so before he has entered upon the management or intromitted with the estate (*e*). But if he have interfered in the administration,—even though that were only in one act,—*si res non sunt integræ*,—there is no longer liberty allowed him to resign. The observation made by the Lord President with regard to trustees, is applicable to tutors too: 'Trustees must not imagine, that whenever they are tired of their office, they can slip their necks out of the collar, and leave the trust to be extricated by the Court' (*f*). The decisions as to tutors sanction the same

(*a*) Inst. i. 22, 2, and i. 22, 5; Dig. xxvi. 1, 14, 3, and sec. 5; Warnk. vol. iii. p. 212. Et sic quidem etiam ipso jure sine facto hominis finitur tutela: 2 Bockleman, p. 203.

(*b*) *Supra*, pp. 176–180.

(*c*) *Supra*, p. 176.

(*d*) *Supra*, p. 192.

(*e*) Craig ii. 20, 7; *Stewart* v. *Dunkeld*, M. 16248 (1628). See the analogous case of a trustee, *Bannerman* v. *Bannerman*, 1 Dec. 1842, 5 D. 229.

(*f*) *Carstairs and Others*, petrs., Hailes 678 (1776). See these cases: *Lynedoch* v. *Ouchterlony*, 15 Feb. 1827, 5 S. 358, H. of L. 7 July 1830, 4 W. S. 148; *Davidson* v. *Mackenzie*, 9 July 1835, 13 S. 1087; *Hill* v. *Mitchell and Others*, 9 Dec. 1846, 9 D. 239, with the *dicta* of the judges; and *Hill* v. *Hill*, 11 July 1855, 17 D. 1104, where the Court refused to appoint a judicial factor, there being trustees who could act. In *Watson* v. *Crawcour*, 17 Feb. 1844, 6 D. 687, the Court sustained a nomination of new trustees by one as the sole survivor, the other trustee having *resigned* and gone abroad. But see, as to this case, *Smith* v. *Smith*, 20 March 1862, 24 D. 838, and *Kelland* v. *Douglas*, 28 Nov. 1863, 2 Macph. 150. A remedy for the inconveniences which attended a rigid application of this rule was found in the power which the Court exercised, on special cause shown, of liberating a trustee from the office, or in the practice, which was not uncommon, of

principle (*a*). The rule applies also to curators, who cannot resign or renounce at pleasure (*b*); and the consent of co-tutors would not validate a resignation of one of them (*c*).

Applications to Court for leave to resign.

But although tutors and curators are thus at their own hand unable to free themselves from the office when its duties become troublesome, yet seeing that many cases may occur where it would be prejudicial to the minor to insist rigidly on the maintenance of this rule, the practice has been introduced of applying to the Court for liberty to resign the office. This the Court will grant, on a sufficient reason being assigned (*d*). Thus, a party, while in an infirm state of health, was served tutor-at-law to his infant nephew, and two years afterwards applied by petition to be relieved of his office, on the ground of his health having become still more infirm. The other relations of the pupil making no opposition, the Court allowed the tutor to renounce, and appointed a factor *loco tutoris* (*e*). The modern cases as to the resignation of trustees with consent of the Court also illustrate this subject (*f*). By the Pupils' Protection Act, the Court of Session is empowered, on cause shown, to remove or accept the resignation of any tutor or curator coming under the provisions of the Act, and to appoint a factor *loco tutoris* or *curator bonis* in his room. The Act is declared to apply to tutors-at-law of pupils, curators to an insane person or idiot, and to tutors-dative appointed to pupils, or insane persons or idiots (*g*).

Removal as suspect.

(6.) Although guardians are not, as they were by the Roman law, considered public officers, yet the law of Scotland has so far

introducing into trust deeds a power of resignation. By the statute 24 and 25 Vict. c. 84, such a power is imported into all trust deeds which do not expressly declare that the Act shall not apply to them. This Act is retrospective; *Reid and Others*, 31 March 1863, 1 Macph. 774.

(*a*) M'Ken. i. 7, 21, and Obs. on Stat. 1555, c. 35; Ersk. i. 7, 29; Bell's Prin. sec. 2085. *Gordon* v. *Dunbar*, M. 16333 (1711); *Scott* v. *Scott*, M. 16269 (1664); *Dow* v. *Seaton*, 2 Fount. Dec. 451 (1708).

(*b*) See Act 1555, c. 35; Ersk. i. 7, 29; *Gordon* v. *Dunbars*, M. 16333 (1711).

(*c*) See *Logan* v. *Meiklejohn*, 26 May 1843, 5 D. 1066.

(*d*) Stair i. 6, 24; Ersk. i. 7, 29. *Per* Lord Cuninghame in *Bannerman* v. *Bannerman*, 1 Dec. 1842, 5 D. 229.

(*e*) *Munnoch*, 7 July 1837, 15 S. 1267.

(*f*) *Bannerman* v. *Bannerman*, *ut supra*; *Logan* v. *Meiklejohn*, *ut supra*. See also *dicta* of the judges in *Davidson* v. *Mackenzie*, 9 July 1835, 13 S. 1087; and *Hill* v. *Mitchell*, 9 Dec. 1846, 9 D. 239, where the resignation was sustained, because sanctioned by all the beneficiaries.

(*g*) 12 and 13 Vict. c. 51, ss. 26, 31.

retained the principles of the Roman law, as to hold them amenable for their administration to the Court of Session. That Court has been in the use of checking or removing a tutor who discharges his duties improperly, from times coeval with the earliest notice of the law of guardianship in this country. Being a part of the duty of a court of equity, the later practice has confined the right to remove a tutor solely to the Court of Session. By the old statute 1555, c. 35, relative to the appointment of curators by minors, it was competent for any Judge Ordinary to have entertained such a complaint; and the right of the Court of Exchequer to remove tutors-dative has been sustained by the Court of Session (*a*). By long immemorial custom, however, the jurisdiction has been exercised by the Court of Session (*b*).

By the Pupils' Protection Act (*c*), the tutors and curators to whom the Act applies are placed under the direct supervision of the Accountant of the Court of Session, whose duty it is to examine into their discharge of their duties, and report any irregularities in the management to the Lord Ordinary.

What justifies the removal of the tutor as suspect.

Suspect tutors are those who, by a single act or course of acts, have done or omitted to do something, the performance or omission of which has been productive of injury to the pupil. The conduct of the tutor does not require to be marked with dole to warrant his removal; it is enough if, through incapacity, bad health, or negligence, he do not perform the duties which his office imposes on him. *Non solum dolus vel lata negligentia suspectum reddit tutorem, verum etiam levior culpa* (*d*). 'The grounds,' says Bruce, 'for removing a tutor are not only downright fraud, treachery, and undutiful carriage in the office, but negligence, inconsideration, laziness, total omission, nay, even rusticity' (*e*). Erskine says, 'If tutors or curators should fail in any part of their duty through negligence, or should fraudulently misapply the minor's money to wrong purposes, they may be removed as suspect' (*f*). The latter part of this doctrine, as to the misapplication of money, is just one

(*a*) *Mersington* v. *Fletcher*, 4 Sup. 272 (1694).

(*b*) Ersk. i. 7, 29; Bruce's Tutor's Guide, pp. 301, 302. See 12 and 13 Vict. c. 51, s. 31.

(*c*) 12 and 13 Vict. c. 51, s. 25.

(*d*) Inst. i. 22, 6; Dig. xxvi. 10, 3, 5, and same title, l. 4, s. 4; same title, l. 7, s. 1; Code v. 43, 9.

(*e*) Tutor's Guide, p. 296.

(*f*) Ersk. i. 7, 29.

illustration of the general principle, that if the tutor *do* anything in violation of his trust, he may be removed; while the first part refers to the omission to do what he is bound to perform.

All grounds upon which a tutor is debarred from accepting the office, will justify his removal from it after acceptance (*a*).

Wherever, in the opinion of the Court, the tutor labours under any moral, intellectual, or physical infirmity, he may be removed. Moral incapacity raises a question most frequently with regard to female tutors guilty of fornication, or the having bastard children. On such grounds, females have been removed from office (*b*). The same rule may also be extended to male tutors; and there can be no doubt that if the pupil were in danger of contamination, or his estate running the risk of injury, from the immoral or dissipated habits of the tutor, the Court would remove him (*c*). The insanity of the tutor would also be a ground of removal (*d*). Physical incapacity might be caused by accident, disease, or extreme old age, and would also justify the Court in relieving the tutor from the office (*e*).

Poverty is not of itself, without some overt wrongous act on the tutor's part, a sufficient reason for removal; and the utmost extent of riches will not absolve a tutor from suspicion (*f*). It would, however, be a sufficient ground of removal, if he prevaricate in defending the minor's rights, with the view to their being lost; or wilfully omit to state a valid defence, or abandon the administration; or refuse necessaries for the minor's aliment and education, having funds of the pupil's in his hands to do it; or embezzle the funds; or not institute necessary actions (*g*); or become insolvent, or his cautioner become such; or be relieved and no other found (*h*);

(*a*) See the necessary qualification for the office stated *supra*, p. 169 *seq.*

(*b*) Dig. xxvii. 2, 1, 1; Dig. xxvii. 2, 5; Balf. p. 116; Craig ii. 20, 14; Bankt. i. 7, 30. *Wod* v. *Monypenny*, M. 16226 (1557); *supra*, p. 214.

(*c*) *Dishington* v. *Hamilton*, M. 16227 (1558); *supra*, p. 77 *seq.* and p. 221. Heinec. Com. Pan. Pars iv. No. 345.

(*d*) Stair i. 6, 24; Bankt. i. 6, 11, and i. 7, 30; Ersk. i. 7, 29.

(*e*) Stair i. 6, 24; Ersk. i. 7, 29. *Munnoch*, 7 July 1837, 15 S. 1267.

(*f*) Inst. i. 26, 5; Dig. xxvi. 10, 8. See *supra*, p. 167.

(*g*) *Mersington* v. *Fletcher*, 4 Sup. 272 (1694). Dig. xxvi. 10, 3, 5; Dig. xxvi. 10, 3, 17, and also secs. 14 and 15, and 12; Dig. xxvi. 10, 7 *ult.*; Dig. xxvi. 10, 7, 1; Stair i. 6, 26; Ersk. i. 7, 29.

(*h*) *Mersington*, *supra*; *Welsh* v. *Welsh*, 5 Sup. 634, Hailes 788, and M.

or if a father, as administrator-in-law, or a tutor-testamentar be ordained by the Court to find caution, and be unable to do so (*a*); or if the tutors waste and destroy, or negligently allow to decay, the pupil's means (*b*), or cheat and circumvent the pupil's father at his death (*c*), or violate the order of the Court relative to the custody of the child's person, or any proper agreement entered into in regard to it, or remove it out of the jurisdiction of the Court in a clandestine and unwarrantable manner (*d*). But although it is illegal for a tutor to take his ward's means in loan to himself, yet the doing so is not necessarily a sufficient ground of removal (*e*). Where the tutor seems to have acted in *bona fide*, and when the estate of the pupil has not been exposed to risk, the Court may not remove the tutor; but when the estate of the pupil is exposed to danger, as where the tutor uplifts the principal sums due, and employs them in his own trade or business, the Court will remove the tutor, and even in extreme cases inflict an arbitrary punishment (*f*).

The principal and most frequently occurring ground of removal of tutors, is the failure to make up tutorial and curatorial inventories; and this branch of the subject has been already fully considered (*g*). It is no ground for the removal of a tutor as suspect, that he has a claim against the minor (*h*), or that he is negligent in the management of his own affairs (*i*).

In the Books of Styles, a form of a bond of caution to be granted for a tutor-testamentar suspect will be found. The object of this is, to avoid the necessity of removing him, by affording additional security to the pupil. This was the mode appointed by the Act 1696, c. 8, for dealing with tutors-testamentar nominated

16373 (1778); Stair i. 6, 26; Bankt. i. 7, 34; *M'Laurin*, petr., 28 June 1831, 3 Jur. 550.

(*a*) Act 1696, c. 8; Bankt. i. 7, 34. *Welsh* v. *Welsh*, *ibid.*; *Witherspoon*, M. 16372, 5 Sup. 604, Hailes 665, M. 7450 (1775).

(*b*) *Heriot* v. *Libberton*, M. 16229 (1564).

(*c*) *A.* v. *B.*, M. 16300 (1680).

(*d*) *Gordonston* v. *Gordon*, 4 Sup. 725 (1708); *Reoch* v. *Robb*, 14 Nov. 1817, F. C., note to this case.

(*e*) *Elphinstone* v. *Robertson*, 28 May 1814, F. C.

(*f*) *Dewar*, 8 Dec. 1853, 16 D. 163; and 7 Feb. 1854, 16 D. 489.

(*g*) *Supra*, p. 207.

(*h*) *Charteris* v. *Charteris*, 3 Sup. 429 (1682). But see the case of *Hadden* v. *Barr*, 27 Feb. 1822, in 3 Bell's Illus. p. 32.

(*i*) Bruce, p. 304; Bankt. i. 7, 31.

with the privilege of that Act (*a*). There is another rule borrowed from the Roman law, which was formerly frequently acted upon. The law was tender of the reputation of tutors; and not wishing unnecessarily to hurt it, the Court endeavoured to secure the pupil from hazard, by joining with the suspect tutor another person, with equal powers of administration, under the name of curator (*b*). All the authorities which sanction this practice are old, and no instance of such an appointment has occurred in modern times. The extensive and almost universal resort to the appointments of factors *loco tutoris*, has in a great measure superseded these ancient precedents; and it does not seem at all probable that the Court would in the present day adopt the ineffectual expedient referred to, attended as it must be with quarrels in the management, and with the consequent evil of useless litigation. The whole spirit of the later practice is in favour of removal at once, and the appointment by the Court of a factor of their own.

Form of the action of removal.

The formal mode of removal is to institute a regular action in the Court of Session, setting forth the manner of the tutor's appointment,—his acceptance of the office,—the matters which render him suspect,—and concluding to have him decerned to renounce, and to divest himself of the office. A conclusion of count and reckoning is sometimes also added (*c*). The Act 1696, c. 8, allows a complaint to be made against a tutor-testamentar, appointed with the privileges of that Act, by way of summary petition and complaint. And in a late case, such a petition and complaint was presented and sustained, and answers were ordered; but as the parties differed about the facts, the Court remitted to the Lord Ordinary to make up a record, as being the most expeditious mode of proceeding where the parties differed as to facts (*d*). Bankton, upon the authority of the Act 1696, held that a summary petition and complaint was competent in all cases (*e*). Erskine thought that summary complaint was only applicable to 'the special

(*a*) Ersk. i. 7, 29; *Balfour* v. *Forrester*, M. 16320 (1705); *M'Brair* v. *M'Brair*, M. 16279 (1667).

(*b*) Hein. Com. Inst. s. 305; Warnkönig, Com. vol. iii. p. 213; Vinnius i. 26, 5; Noodt, vol. ii. p. 565. *A.* v. *B.*, M. 16219 (1534); *M'Brair* v. *M'Brair*, *supra*. Balf. 118; Craig ii. 20, 15; Bankt. i. 7, 31; Ersk. i. 7, 29.

(*c*) 3 Jurid. Styles, p. 113; 3 Bell's Forms 320.

(*d*) *Malcolm* v. *Webster*, 24 Nov. 1840, 16 F. C. 65.

(*e*) Bankt. i. 7, 34.

case of tutors named in consequence of the Act 1696, c. 8' (*a*); and Elchies thus reports a case: 'Tutor suspect cannot be removed on a summary complaint, notwithstanding the Act 1696' (*b*). This doctrine is supported by many later authorities (*c*), although there are recent cases where ordinary tutors have been removed upon a summary petition and answers, apparently on the ground set forth by Bankton, that a regular action would be 'tedious and troublesome' in a matter which requires the greatest despatch (*d*). If the parties differed as to facts, the Court, as in the case already cited, would remit to the Lord Ordinary to make up a record. Where, however, the circumstances are not so bad as to call for such despatch, the Court, in its discretion, may appoint the petitioner to proceed by ordinary action; and so a petition and complaint for the removal of a tutor-at-law as suspect having been presented on the ground of alleged malversations in office, and the respondent objecting to the competency of the complaint, the Court, while they expressed an opinion that in cases of extreme urgency they might interpose on a summary petition, yet as the circumstances of the case did not call for such extraordinary despatch, ordered an ordinary action to be repeated, and meantime sisted the complaint (*e*). The Court have, however, in several recent cases, removed trustees and tutors on a summary application (*f*). A special summary jurisdiction is conferred upon the Court of Session in regard to the tutors and curators who are subject to the provisions of the Pupils' Protection Act (*g*).

Who may raise the action.

The action may be raised at the instance of the pupil himself, authorized by a tutor *ad litem;* and the disclamation of the action by the nearest of kin of the pupil will not bar his right to sue (*h*).

(*a*) Ersk. Prin. i. 7, 16, and Ersk. Inst. i. 7, 29.

(*b*) *Miller* v. *Dunning*, Elch. *v.* Tutor 1 (1734).

(*c*) 3 Jurid. Styles, p. 113; Bell's Prin. s. 2085; Ivory's note to Ersk. i. 7,29; More's Notes, p. xli.; Brodie's note to Stair i. 6, 26. *Hamilton* v. *Elibank*, M. 14965 (1700); *Austin* v. *Wallace*, 21 Dec. 1826, 5 S. 177; *Reoch* v. *Robb*, 14 Nov. 1817, F. C., note to the case.

(*d*) *M'Laurin*, 28 June 1831, 3 Jur. 550.

(*e*) *Butchart* v. *Butchart*, 1 July 1851, 13 D. 1258.

(*f*) *Dewar*, 8 Dec. 1853 and 7 Feb. 1854, 16 D. 163 & 489; *Fleming* v. *Craig*, 30 May 1863, 1 Macph. 850; *Mitchell*, 20 July 1864, 2 Macph. 1378; *Mrs M. Johnston* or *Gibson*, 28 Feb. 1865, not rep.

(*g*) See *infra*, Factor *loco tutoris*, for the procedure against defaulting factors and others under the Pupils' Protection Act.

(*h*) *Austin* v. *Wallace*, 21 Dec. 1826, 5 S. 177.

It is competent also, at the instance of any of the pupil's relations, or of a co-tutor (*a*). But persons not thus related to the pupil have no right to interfere; the maxim of the Roman law, by which a process of this kind was regarded with extraordinary favour, and every citizen allowed the privilege of pursuer in it if he chose, being unknown to the law of Scotland (*b*). The Roman lawyers termed the process an *accusatio suspecti tutoris*, and Erskine has adopted the term. By the Roman law, when an action had been instituted to have a tutor removed as suspect, he was immediately interdicted from the administration, and a curator was put in his room till the cause were terminated (*c*). This does not appear yet to have been adopted in Scotland, though perhaps in a case of urgency, where a tutor was dilapidating his ward's effects, and the action for his removal could not be terminated till the expiry of a considerable period, the Court might interfere in the same way. In a recent case, where the tutor had uplifted the funds constituting the pupil's estate, and had invested them in sheep stock for his own farm, the Court removed the tutor at once as suspect, and appointed an *interim* factor on the estate, ordaining the tutor instantly to execute in his favour a disposition *omnium bonorum*, and instructing the factor with as little delay as possible to recover the funds and report to the Court. Thereafter, the funds having been realized, they appointed a permanent factor on the estate (*d*). It is *pars judicis* to remove a tutor guilty of acts rendering him suspect. *Et hinc ille tutorem suspectum quem nemo accusat removere potest* (*e*). All tutors may be removed; fathers may be so as well as others (*f*). On the removal of a tutor, a factor *loco tutoris* is appointed in his room, if none having a better title claim the office (*g*).

(*a*) Stair i. 6, 26; Bankt. i. 7, 34; Erskine. i. 7, 29. *Wotherspoons*, petrs., 5 Sup. 604 (1774); *Trotter* v. *Trotter*, 3 Sup. 433 (1682).

(*b*) *Welsh* v. *Welsh*, M. 16373, Hailes 788, 5 Sup. 634 (1778). In this case, the Court thought a cautioner for curators had no right to institute an action of removal of the curators as suspect.

(*c*) Inst. i. 26, 7; Code v. 43, 7, *de suspect. tut.*

(*d*) *Accountant of Court* v. *Dewar*, 8 Dec. 1853, and 7 Feb. 1854, 16 D. 163 and 489.

(*e*) Hein. Com. Inst. No. 304; Warnk. p. 214, vol. iii.

(*f*) Bruce's Tutor's Guide, p. 302; *Forbes* v. *Forbes*, M. 16287 (1673); *Johnstone* v. *Wilson*, 11 July 1822, 1 S. 558; *Glassford*, 24 Feb. 1849, 11 D. 1030. But see *Walton*, 17 Jan. 1850, 12 D. 912.

(*g*) *Wotherspoon*, M. 16372 (1775).

Effect of the termination of the office upon the tutor's acts thereafter.

II. After the office has terminated in any of the modes now explained, the powers of the tutor cease; and if he perform any act in his tutorial capacity, it will not bind the pupil. Thus, a discharge granted by tutors of a bond for money lent out by them, was found ineffectual against a challenge by the pupil, seeing that it was granted after the tutory had expired (*a*). As a consequence of this rule, a tutor is not bound to carry on to completion any act of management in which he may be engaged. A tutor intromitting with coal rent daily wrought, was held entitled to give up his management on the very day that the minority ended, though it happened at no legal term (*b*); and a tutor cannot be sued on decrees obtained against him *quâ* tutor, *durante tutela*, any more than a husband can for his wife's debts after the marriage is dissolved (*c*).

But, on the other hand, if the tutor should unwarrantably continue the administration after the office has come to an end, he incurs the liabilities of a pro-tutor. He is denied all the powers and rights of a tutor; but, at the same time, as a punishment for his wrongous intromission, he is subjected to liabilities which exceed even a tutor's in severity (*d*).

SECTION II.

ACCOUNTING BETWEEN PARENTS, AS ADMINISTRATORS AND TUTORS-NOMINATE, AND PUPIL (*e*).

On the expiry of the tutor's office, he is obliged to give an account of his whole intromissions with the pupil's funds, to pay over the balance, and to restore the whole title-deeds, writings, and

(*a*) *Lockhart* v. *M'Kenzie*, 15 Dec. 1826, 5 S. 136; aff. 24 June 1829, 3 W. S. 481. See also *Bruce* v. *Sinclair*, M. 16239 (1610); *Forbes* (1673), M. 16287; *Foster* (1610), M. 16238.

(*b*) *Cass* v. *Ellies*, M. 16285 (1672). See also *A.* v. *B.*, M. 16218 (1533). Balf. p. 121, No. 135.

(*c*) Bankt. i. 7, 46; Fraser, Pers. and Dom. Rel. vol. i. p. 289.

(*d*) See *infra*, Part iv. chap. i.; Stair i. 6, 24; Ersk. i. 7, 29; Bruce's Tutor's Guide, p. 366; *Vallances* v. *Forrester*, M. 16255 (1630); and same case 16254.

(*e*) This section does not apply in all respects to tutors-dative and tutors-at-law. The provisions of the Pupils' Protection Act under which they account will be explained in a separate section.

other property, which were in the father's custody at the time the tutor entered upon the management, although they may not belong to the pupil (*a*). Tutors who have made investments in land in their own names as tutors, are also bound on the expiry of the tutory to denude in favour of the ward (*b*).

The action by which the minor can compel accounting, is termed the *actio directa tutelæ*. The obligation to render an account is so incumbent on tutors, that it would be held still to subsist, though the father should, in his nomination of tutors, expressly exempt them from the duty, and declare that their own simple assertion as to how the balance stood would be sufficient. Such an exemption the law holds to be *ultra vires*, contrary to good policy, and an incentive to peculation and fraud (*c*).

Who entitled to institute the action of accounting.

This action of count and reckoning is competent not only to the ward, but to his heir and creditors; and against the heir of the tutor, in like manner as against himself. The tutor's cautioners should be called as parties (*d*). It is competent either in the Court of Session or the Sheriff Court (*e*). Where there are more tutors than one, they ought all to be called as defenders, because, being liable *singuli in solidum*, it may happen that one of them may have paid the common debt, and so extinguished the claim (*f*). Where the heirs of a tutor are the defenders, the Court will not sustain process till the co-tutors have been called (*g*). It is incompetent to present a summary petition to have the accounts of a tutor examined, and his intromissions approved of; this must be done by regular action (*h*).

(*a*) Stair i. 6, 21; Bankt. i. 7, 35; Ersk. i. 7, 31; Bell's Prin. sec. 2086; *Reid* v. *Reid*, M. 16272 (1665).

(*b*) *Lady Kennedy* v. *Innes*, 6 June 1823, 2 S. 375.

(*c*) Wal. p. 349; Dig. xxvi. 7, 5, 7; Tract. by Vinnius, No. 16, and authorities there cited; Bruce's Tutor's Guide, p. 419; 1 Domat, p. 276, No. 32; *Boswell* v. *Logane* (1522), M. 16215.

(*d*) *A.* v. *B.*, M. 16219 (1538); Wall. p. 350; Dig. xxvii. 3, 1, 16; Dig. xxvii. 3, 18; Dig. xxvii. 3, 1, 17.

(*e*) Dallas, p. 372; 3 Jurid. Styles, p. 35; Frazer's Judl. Proceedings, p. 178 *seq.*; Bruce, p. 426.

(*f*) Stair i. 6, 23, Brodie's note; *Napier* v. *Nicolson*, M. 2186 (1684); *Seaton* v. *Seaton*, M. 2185 and 12767 (1668); *Hamilton* v. *Lundie*, M. 16289 (1674).

(*g*) *Seaton* v. *Seaton*, *ibid.* The summons will be found in the Books of Styles, 3 Jurid. Styles, pp. 35–37; 3 Bell's Forms, p. 323; Frazer's Judl. Proceedings, p. 178 *seq.*

(*h*) *Marjoribanks*, 25 Nov. 1846, 9 D. 168. But see *Ritchie*, 9 Feb. 1830, 8 S. 469, where the competency of a summary petition does not seem to have been doubted.

Action at the instance of the tutor.

It may happen that the balance at the expiry of the tutory stands against the pupil, and that in consequence he is unwilling to come to a count and reckoning. The tutor himself may then institute the action, which, in consequence, received in the Roman law the name of the *actio contraria tutelæ*. This action differs in nothing from the *actio directa tutelæ*, except in reversing the parties as pursuer and defender. Both are actions of count and reckoning (*a*). The tutor sues the minor to discharge him of his office, relieve him of all obligations undertaken in the course of administration, and reimburse him of all sums expended on the minor's account, with interest.

Presumption of *intus habet*.

Prior to the tutor's rendering an account, the law presumes *intus habere;* that is, *first*, that he is possessed of as much of the pupil's property as will balance any claim he may have against the pupil. And consequently, neither he nor his assignee, or other singular successor, is entitled to obtain decree for any debt due to himself, incurred during the tutory, until he has actually accounted (*b*). This presumption holds, although the decennial prescription of tutorial accounts has run in favour of the tutor (*c*). The presumption is inapplicable to debts due by the pupil's father to the tutor, prior to the commencement of the office. *First*, Because the only rational foundation on which it is established, restricts it to the expense incurred by the tutor on the minor's account. *Secondly*, Because it is repugnant to justice, that a creditor's right of demanding a just debt should be postponed, for no better reason than that he has undertaken a friendly and gratuitous office for his debtor, for *officium nemini debet esse damnosum* (*d*).

Purchases by tutor as to pupil's property, presumed to be

The *second* presumption against the tutor is, that all purchases made *durante tutela* by the tutor, of rights affecting the pupil's estate, are presumed to have been made with the pupil's money (*e*),

(*a*) Ersk. i. 7, 32. See *Forestare* (1528), M. 16217, and *Tailfer* v. *Sandilands* (1677), M. 16293.

(*b*) Stair i. 6, 28; Bankt. i. 7, 40; Ersk. i. 7, 32; M'Ken. i. 7, 10. *Melville* v. *Montgomerie*, M. 16292 and 9845 (1676); *M'Dougall* v. *Applecross*, M. 16308 (1686); *supra*, p. 292.

(*c*) Bankt. i. 7, 44 and 45; Ersk. i. 7, 32; *Baillie* v. *Baillie*, M. 10001 (1714); *Scott* v. *Douglas*, M. 10004, top of page, and Elch. *v.* Tutor 8 (1737).

(*d*) Ersk. i. 7, 32; *Muir* v. *Crawford*, 4 Sup. 298 (1696); *Newmills* v. *Smith*, M. 9989 (1687).

(*e*) *M'Dougall*, *supra*; *Melville*, *supra*; *Ramsay* v. *Winton*, M. 9977 (1662); *Grant* v. *Grant*, M. 11497

a presumption which may, however, be redargued in certain circumstances, even during the subsistence of the tutory, by contrary proof (*a*). This presumption strikes against a claim made even by the tutor's onerous assignee or singular successor, however long may be the period since the pupillarity expired (*b*). It may be elided by the tutor's finding sufficient security for the balance, if any shall be found due to the pupil after the tutor's accounts are passed (*c*). It does not apply to rights acquired by the tutor prior to the commencement of the office, or after it has terminated (*d*).

by pupil's money.

Tutors are only bound to account to the minor at the termination of their office, as it would be a hardship that a person managing a trust should be obliged to account for all his actings as manager, while he still continues his transactions (*e*). Where a creditor of the pupil pursues, it is otherwise (*f*).

Tutor accounts only at the termination of the office.

In the accounting, the tutor must give the pupil credit, in the first place, for the whole property contained in the inventory; he must show in what manner the contents of that inventory were disposed of; for, although everything therein contained is not held *presumptione juris et de jure* to have belonged to the pupil, yet it creates a *presumptio juris* against the tutor, imposing on him the *onus* of showing that what it contains belonged to others, or that he duly administered it for the pupil's benefit, and now accounted for it (*g*). But the inventory is not, on the other hand, conclusive against the pupil, as establishing that at the time it was made up he was not possessed of any other property than what is contained in it. He is entitled to show, *aliunde*, that he had other funds which were not included, which the tutor intromitted or ought to have intromitted with, and for which he is bound to account (*h*).

He accounts for contents of inventory.

(1662); *Douglas* v. *Scott*, 1737, Elch. *v.* Tutor 8; Ersk. i. 7, 32; Bankt. i. 7, 40.

(*a*) See *supra*, p. 292 *seq.*

(*b*) *Ramsay* v. *Winton*, *supra*; *Cleland* v. *Baillie*, M. 9983 (1679); *Spence* v. *Scott*, M. 9981 (1676); *Brebner* v. *Cook*, M. 9998 (1714); *M'Dougall* v. *Applecross*, M. 16308 (1686); Stair i. 6, 28, and iii. 1, 12.

(*c*) Bankt. i. 7, 40; Stair i. 6, 28; *Ramsay* v. *Winton*, *ut supra*; and see *supra*, p. 292 *seq.*

(*d*) *Supra*, p. 320 (*d*).

(*e*) Ersk. i. 7, 31; 3 Jurid. Styles, p. 35; Dig. xxvii. 3, 4; Dig. xxvii. 3, 9, 4; Dig. xxvii. 3, 17.

(*f*) *Supra*, p. 275 *seq.*

(*g*) Ersk. i. 7, 31; Bell's Prin. 2086.

(*h*) *Cleland* v. *Baillie*, M. 12451 and 9983 (1679). See *Watherstone* v.

If the tutor intromitted with them in his tutorial capacity, it is an incompetent objection for him to urge, that they did not belong to his ward (*a*).

Current rents.

Along with the principal funds thus obtained by the tutor at his entry to the administration, he must also account for the current rents, interests, profits, and dividends of the pupil's estate, and for legacies bequeathed to him, donations, or any other sums which he received, or might with due diligence have recovered.

How interest chargeable against tutor.

The account must be made up on the principles already explained (*b*). It must be brought to an annual balance; bank interest must be allowed *de die in diem* to the end of the year; and the interest on money lent on heritable security three months thereafter.

Kain and flying customs.

Tutors are not bound to account for every minute or insignificant portion of property which they may intromit with, and which is naturally presumed to have been used in the course of the management (*c*). And in illustration of this doctrine, reference is made to certain old decisions, by which it was found that tutors were not obliged to account for the value of such services as are due by the tenants in kind, such as harrowing, ploughing, shearing, unless the deceased proprietor could have demanded money for them; because the pupil does not in this case sustain a patrimonial loss, and only allows an *innoxia utilitas* to the tutors (*d*). Nor is he liable for such of the smaller flying customs which are sometimes given to landlords, such as kain, *e.g.* hens, chickens, capons, butter, etc., unless these amount in quantity to a considerable portion of the rent, or unless the deceased proprietor had it in his option to demand money for them (*e*).

How grain rents accounted for.

As it is an established principle, that tutors ought not to make any profit by their office, they must account for those rents of the minors, which are payable in grain not commutable according to

Tutors, M. 16275 and 9420 (1665); Ersk. i. 7, 31; *Balfour* v. *Wood*, M. 3504 (1670); *Butchart* v. *Butchart*, 17 July 1863, 1 Macph. 1123.

(*a*) *Watherstone*, *ibid.*; *Reid* v. *Reid*, M. 16272 (1665); *Carmichael* v. *Porteous*, 1737, Elch. *v.* Tutor 9.

(*b*) See *supra*, p. 235 *seq.*

(*c*) Stair i. 6, 22; Bankt. i. 7, 35; Ersk. i. 7, 31.

(*d*) *Grant* v. *Grant*, M. 16280 and 12172 (1668).

(*e*) *Wright* v. *Veitch*, M. 16299 (1680); *Lude* v. *Lude*, M. 16305 (1684). See More's Notes, p. xxxvii.; Ersk. i. 7, 31.

any standard, by the actual sum which they received for the grain when sold, if it exceed the fiars prices; and if the sum received did not exceed these prices, then they must account according to the fiars (*a*).

Moveables in the confirmation of the pupil's father's testament.

In obtaining confirmation of the testament of the pupil's father, the value of the pupil's moveables is stated according to the valuation of an appraiser. If the property so appraised have been afterwards sold, it is the price obtained at the sale that must be accounted for to the pupil (*b*); and it is competent to prove, that the inventory of the appraiser did not contain the whole of the minor's moveables (*c*).

Disbursements of tutor.

In the discharge side of the account the tutor will place all his legal disbursements, which must be duly vouched; or, at least, certificates of payment (if the receipts be lost) must be produced (*d*). And if at any time he is in advance for the pupil from his own funds, he is entitled to interest at five per cent. upon such advance, so long as the balance continues in his favour (*e*). He has a claim for indemnification of all losses which he has sustained in the administration of the office; to be freed from all legal and rational engagements come under by him *quâ* tutor; to re-imbursement of all payments made by him from his own funds, with interest (*f*); and to his personal expenses in the management of the pupil's affairs. 'A curator having, in his accounts, given in an article of incident charges upon occasion of the minor's affairs, viz. that he had met with agents and others in taverns, in relation to the pupil's affairs, and had been at charges in drinking with

(*a*) Ersk. i. 7, 31; *Murray* v. *Tutor*, M. 16267 (1662); *Oxenford* v. *Curators*, M. 4417 (1671).

(*b*) *Wilson* v. *Foulis*, M. 16304 and 502 (1683).

(*c*) *Watherstone* v. *Tutors*, M. 16275 and 9420 (1665).

(*d*) *Bruce* v. *Forsyth*, M. 16327 and 3512 (1708); *Sandilands* v. *Telfer*, M. 16300 (1680); *Lambe* v. *Ritchie*, 14 Dec. 1837, 16 S. 219, and 22 Dec. in Jur.

(*e*) Dig. xxvii. 4, 3, secs. 4, 5, 6; Bankt. i. 7, 41. *Shanks* v. *Yule*, 5 Sup. 880, M. 532 (1760); *Forrester* v. *Forrester*, M. 16217 (1528); Ersk. i. 7, 32; *Condie* v. *M'Donald*, 20 Nov. 1834, 13 S. 61.

(*f*) Authorities cited:—*Forrester* v. *Forrester*, M. 16217 (1528); *Stuart* v. *Stevenson*, 23 Feb. 1828, 6 S. 591. In this last case, the tutor was allowed to charge against pupil an accountant's fee incurred in an action of accounting brought against him by a co-tutor, and paid in order to get up vouchers to produce them in a subsequent action of accounting at pupil's instance.

them, extending to a considerable sum, during the whole time of his charge, the Lords did not allow the same in the terms foresaid, but ordained him to condescend upon the particulars; and if he kept a book and diary of his disbursements, so that he might warrantably declare that he had truly debursed the particulars therein mentioned, they inclined to modify the same to such a sum as they should find reasonable' (*a*). And in the same case, a slump sum was put down for the pupil's aliment, but 'the Lords allowed no more for the aliment than what should be instructed truly expended' (*b*). In several cases, the Court, while they did not sustain small charges not sufficiently vouched, repaid the tutor these by increasing the allowance for aliment which they had the power to do (*c*). Under these modes of stating it, the tutors are entitled 'to whatsoever they wared out profitably' (*d*). Nay, it is even carried further; for although the disbursements have been utterly profitless to the pupil, yet if they appeared prudent and rational at the time they were made, the tutor will be allowed credit for them (*e*). The expense of reasonable actions, unfortunate in their issue, illustrates this (*f*).

Abatements obtained by tutor to be accounted for.

The tutor must give the pupil, in the accounting, the benefit of all eases obtained by him in settling transactions; and any gratuitous acquisition obtained to the pupil's estate the tutor is not

(*a*) *Tailfer* v. *Sandilands*, M. 16293 (1677).

(*b*) *Sandilands* v. *Telfer*, M. 16300 (1680).

(*c*) *Drummelzier* v. *Tweedale* (1680), M. 16300; *Wilson* v. *Foulis* (1683), M. 16304.

(*d*) Stair i. 6, 28; Bankt. i. 7, 41; Ersk. i. 7, 32. *Burnet* v. *Johnston*, M. 16307 (1685).

(*e*) Dig. xxvii. 4, 3, 7; 1 Domat, p. 277, No. 35. But see *supra*, where the disbursements were fruitless, p. 234 (*d*).

(*f*) *Anderson* v. *Cameron*, 12 Nov. 1844, 7 D. 92; *Clyne's Trs.* v. *Clyne*, 17 June 1848, 10 D. 1325; *Beattie* v. *Johnstone*, 15 Dec. 1849, 12 D. 357; *Johnstone* v. *Beattie*, 29 Jan. 1856, 18 D. 343, where the case went to the whole Court; *Maconochie*, 4 Feb. 1857, 19 D. 366; *Accountant of Court*, 29 June 1858, 20 D. 1176. In *Sempill* v. *O'Reilly*, 29 June 1853, 15 D. 789, aff. 25 May 1855, 2 Macq. 288, trustees who compeared in an action directed against them and the beneficiaries, and who stated substantially the same defences, were not allowed to charge their expenses against the trust estate. A different rule would hold if the nature of the case required separate defences. See *Campbell* v. *Lauder's Reps.*, 22 Jan. 1853, 15 D. 311. Where there has been anything improper in the conduct of the tutors or trustees, they are not allowed their expenses.—*Fothingham* v. *Salton*, 3 Feb. 1852, 14 D. 427; *Morison*, 5 Dec. 1856, 19 D. 132; *Graham* v. *Marshall*, 22 Nov. 1860, 23 D. 41. See *supra*, p. 271 *seq.*

allowed to claim for himself, but must give the pupil the benefit of it (*a*).

Tutory and curatory gratuitous.

The office of tutor is one which is considered to be discharged, not from the mercenary motives which command at all times the services of strangers, but from kindly feelings of relationship, or of sympathy for the pupil. These considerations led to the adoption of the rule in the Roman law, that the office was gratuitous, unless the father should have given the office with a salary (*b*). And it would appear that the Court, in the exercise of a sound discretion, had, failing the father, the power to give such a salary (*c*). The rule that the office of tutor and curator is gratuitous, has been adopted into our law. In one of the latest cases, where the pure question was tried, the Court, according to Elchies (*d*), 'would gladly have given the allowance, and thought the tutor deserved it, but they thought it not in their power, and likewise *mali exempli*.' In the case referred to, the rule was applied with great severity. The pupil's relations induced a professional gentleman to undertake the office of tutor-dative, by obliging themselves that the pupil should, on her passing pupillarity, allow him £100 sterling for his trouble. This obligation they pursued her to fulfil, but the Court unanimously found that she was not bound by it (*e*). There have, however, been decisions sustaining an allowance to a tutor, who was called upon to make extraordinary efforts in the administration of the estate (*f*). Though the general rule is apparently one of a very harsh description, it in reality is not so; for both tutors and curators may appoint factors with salaries, who

(*a*) Bell's Prin. s. 2086. *Cochran* v. *Cochran*, M. 16339 (1732); *supra*, p. 144.

(*b*) No alteration is made upon this rule of law, in regard to the tutors and curators who are brought under the Pupils' Protection Act. See s. 32.

(*c*) Dig. xxvi. 7, 33, 3.

(*d*) Notes to Decisions, p. 493, No. 4.

(*e*) *Scott* v. *Strachan*, M. 16341 and 13433; Elch. *v.* Tutor, No. 4 (1736). See also Stair i. 6, 28; Bankt. i. 7, 41; *Scotstarvet* v. *Buccleugh*, M. 16266 (1642); *Wilson* v. *Ratho*, M. 16304 and 502 (1683); *M'Donald* v. *Muir*, M. 13437 (1780); *Jackson*, petr., 11 Dec. 1821, 1 S. 203; *Scott* v. *Fife Bank*, 31 Jan. 1833, Jur. When the Court appoint to the office of factor *loco tutoris*, etc., a person entitled to the office of tutor, they usually condition that he shall agree to act gratuitously —see *infra*, *eo tit.*; but such condition will not be imposed *ex post facto*.—*M'Donald* v. *M'Donald*, 7 July 1854, 16 D. 1023.

(*f*) *Wilson* v. *Wilson*, M. 16376, Hailes 1069 (1789). But see *M'Donald* v. *Muir*, *supra*, a very marked case.

will manage the whole of the more weighty matters of the administration, and leave nothing for the tutors to do, but to examine their accounts (*a*). Trustees and tutors cannot, without special power to that effect, appoint one of their own number to be factor with a salary; such trustee or factor, if appointed, being entitled only to actual outlay (*b*).

On the accounts being closed and balanced, the balance found due must be paid over by the tutor, and the pupil's writs and title-deeds delivered up to him (*c*).

Curators *ad litem* are entitled to their expenses, whether they make appearance in the action, or whether in the exercise of a sound discretion they refrain from appearing (*d*).

Accounting commences from tutor's acceptance of office.

The liabilities of the tutor commence only from the date of his acceptance of the office; and although several years may have elapsed during which he might have accepted, and during which the estate was going to ruin, he will not be liable for the omission to manage during that period (*e*).

Tutors-at-law and tutors-dative are now made subject to the Pupils' Protection Act. Their duties and liabilities under its provisions will be discussed in treating of the judicial factors appointed by the Court of Session (*f*).

Discharge of tutor.

A regular discharge is usually given by the minor to his tutors, after his arrival at puberty, of all their intromissions with his funds in those cases where the tutory is wound up extrajudicially (*g*). And if there be no fraud or circumvention used, such discharge

(*a*) *Supra*, p. 268 *seq.*

(*b*) See *supra*, p. 270, especially the case of *Fegan* v. *Thomson*, 20 July 1855, 17 D. 1146.

(*c*) *Reid* v. *Reid*, M. 16272 (1665). In making up this account, some assistance will be found from the detailed form of an account of charge and discharge of tutors and curators, given in the Appendix to the third volume of Bell's Forms. This form is prepared in accordance with the old rules relative to the interest payable on the assets, and is therefore so far defective; in other respects, however, it seems useful and correct. The mode in which the accounting is brought out is by a remit to an accountant, with power to take evidence, as in a commission, as to the conflicting statements of parties. *Stark* v. *Tennent*, 11 Feb. 1843, 5 D. 542.

(*d*) *Robertson* or *Rennie*, 27 June 1849, 11 D. 1201; *Pirie* v. *Collis*, 4 March 1851, 13 D. 841.

(*e*) *Supra*, p. 301; *Muir* v. *Crawford*, M. 16316 (1697); *Scrimgeour* v. *Wedderburn*, M. 16282 and 6357, and 16290, 2 Sup. 614 (1675); *Commissary of Dunkeld* v. *Abercrombie*, M. 16248 (1628).

(*f*) *Infra*, Part iv.

(*g*) See the form, 2 Jurid. Styles, pp. 388 and 391; Bell's Forms, vol. iii. pp. 327, 329.

would be effectual, though it proceeded without count and reckoning (*a*); and it would comprehend the omission of making up legal inventories, and so free the tutor from the penalties of the Act 1672 (*b*). A discharge or decree of exoneration in favour of tutors granted by a *minor pubes* may be reduced by him *intra annos utiles*, on the ground of lesion (*c*).

Decennial prescription.

By the ancient law of Scotland, these actions of count and reckoning could competently be insisted in, at the instance of the pupil or his heirs, at any time within the long prescription of forty years. This proved extremely harassing to tutors, or to their successors, when actions were raised after an interval of years, after the whole transactions had been forgotten. To remove this evil, it was enacted by statute 1696, c. 9, 'That all actions of count and reckoning, competent to pupils and minors, against their tutors and curators for making their accounts, not pursued and insisted in within the space of ten years after the majority of the saids pupils and minors, or after their death, they dying in their minority, shall after that time prescribe for ever; and the saids tutors and curators, and their successors, shall be as fully exonerat and liberat as if the saids pupils and minors, after their majority, had fully and amply discharged the same.' To raise, execute, and call the summons is sufficient to interrupt the prescription (*d*). The tutor does not lose the benefit of this prescription, by omitting to make up inventories in terms of the statute 1696, c. 8 (*e*). And an offer by the tutor, after the years of prescription have run, to afford information regarding his administration, does not bar the plea of prescription (*f*). It has been doubted whether, after the prescription is run, tutors can be sued for clear intromissions, *tanquam quilibet*, or as any other intromitter (*g*). There does not, however, seem to be any foundation for the doubt. The intromissions in such a case were as tutor, and the Act is most express in liberating from all obligation to account after the prescription has run (*h*).

(*a*) *Rankin* v. *Smith*, 4 Sup. 224 (1694).

(*b*) *Walwood* v. *Walwood*, 4 Sup. 433 (1699).

(*c*) *Stuart* v. *Stuart*, M. 9008 (1638); *Ballegerno* v. *Ross* (1683), M. 9011.

(*d*) Ersk. iii. 7, 25.

(*e*) *Mercer* v. *Irvine*, M. 10996, and Elch. *v.* Prescription 6 (1736).

(*f*) *Gowans* v. *Oswald*, 16 Dec. 1831, 10 S. 144.

(*g*) Bankt. i. 7, 43.

(*h*) Bankt. *ibid.*

The presumption of *intus habet* still, however, holds after prescription (*a*). Pro-tutors are entitled to the benefit of the Act (*b*); but there is an unreported later case, where it was held that pro-tutors could be called to account within forty years (*c*).

This prescription strikes also at the *actio contraria tutelæ*, competent to the tutors against the pupil; it being enacted, that 'the contrary action, at the instance of tutors and curators against their pupils and minors, shall prescribe in the same manner within ten years.' The prescription is expressly declared not to run against minors; a provision in favour either of the tutor's heir after the tutor's death, or of the *minor pubes*, who had been in pupillarity, and against whom the prescription does not begin to run till he has arrived at majority. It also operates in favour of the minor's heir, if he himself has died before the accounting. With regard to the *contrary* action, there is more doubt as to the period of computation. In the general case, the ten years run from the expiry of the office, unless where the tutor is dead and his heir is a minor. But where the ward is past pupillarity, and has not yet attained majority, it would appear that the same rule applies that holds with regard to the direct action, viz. that the ten years are computed from the *majority* of the ward, and not from the time when the tutorial office expires by the arrival of the pupil at puberty (*d*). When there are more pupils than one, the ten years run from the time at which the office expired with regard to each respectively, because they have all a separate interest.

This prescription is interrupted by the mere execution of a summons (*e*); but if it proceeds no further, the interruption prescribes at the end of seven years, and must then be renewed. If the action has once been brought into Court, and constituted a depending action, it interrupts the prescription for forty years (*f*).

(*a*) *Supra*, pp. 292 and 320.

(*b*) *Mercer*, *supra*, Elchies' Report.

(*c*) *M'Lachlan* v. *Campbell*, 17 Nov. 1795, N. R.; and see More's Stair, pp. xliv. xlv., notes.

(*d*) Wall. Prin. pp. 356–7; Ersk. iii. 7, 25.

(*e*) *Supra*, p. 327 (*d*).

(*f*) Bankt. i. 7, 42; Ersk. iii. 7, 43. See the Act 1669, c. 9, as to the prescription of interruptions. *Wilson* v. *Innes*, M. 1330 and 10974 (1708); *Cameron* v. *M'Donald*, M. 11331 (1761); *Earl of Forfar* v. *Douglas*, M. 11324 (1669). As to extrajudicial interruption by admission of liability, see *Gowans* v. *Oswald*, *supra*, p. 327 (*f*).

SECTION III.

ACCOUNTING BETWEEN TUTORS-AT-LAW AND DATIVE AND THE PUPIL.

Tutors-at-law and tutors-dative are (except as to appointment and caution) now placed under the provisions of the Pupils' Protection Act (*a*). Their first duty on entering on office after finding caution, is to make up and lodge the rental list and inventory required by sec. 3 (*b*). This, after being adjusted and approved of by the accountant, and signed by him and the tutor, is declared to form a charge against the tutor.

Framing and audit of annual accounts.

The next duty of the tutor is to close his annual account of charge and discharge of his whole intromissions, on a day to be named by the accountant, and to lodge the same duly vouched, within one month thereafter, with the accountant. On special cause, the accountant may prorogate the time for so doing to a period not later than three months after the day when the account was fixed to be closed (sec. 4). These annual accounts and vouchers it is the duty of the Accountant of Court (sec. 13) to 'examine without undue delay, and audit the account on the general principles of good ordinary management for the real benefit of the estate, and of those interested therein.' The accountant is required to consider the investments of the estate and the sufficiency thereof, and is entitled to require from the tutor all necessary information and evidence. The result of his audit is stated in the form of a short report, the tutor being entitled, if the accountant has made any corrections on the account, to require him to explain such corrections, and his reasons for making them. Unless objected to, the accountant's audit and report (sec. 15) is conclusive against the tutor and his cautioner. Objections may, however, be lodged by either of them, in writing, within twenty days after the accountant's report is communicated to the tutor. In such case the accountant considers the objections, and may, if he see cause, alter his report; and unless the objections are allowed or departed from, the account and report, and whole proceedings

(*a*) 12 and 13 Vict. c. 51, ss. 25, 26. (*b*) *Supra*, p. 203 *seq.*

are transmitted by the accountant to the Lord Ordinary, who shall call the tutor or cautioner, or his agent, and, if necessary, the accountant, before him at chambers in reference thereto. The Lord Ordinary or the Court, if the matter shall be reported or brought under review, may affirm, vary, or reverse the audit and report of the accountant, and may reserve any question or questions which are raised in the objections for the tutor or his cautioner till the final audit of his accounts, directing the account to be balanced for the present, as the Lord Ordinary or the Court may think expedient and just. No judgment of the Lord Ordinary is reviewable at the instance of the accountant. It is further incompetent, when the Lord Ordinary has reserved any question, for the tutor or his cautioner to reclaim against such reservation; but in case the Lord Ordinary shall decide against the tutor or cautioner, the interlocutor may be brought under review of the Court by a short note of appeal; and the judgment of the Court shall not be subject to appeal at this stage, nor till the termination of the tutory, without the leave of the Court (*a*).

Opening up of audit of accounts.

It is declared (sec. 17), 'That either at the termination of the tutory, or during its subsistence, it shall be competent for any party beneficially interested in the estate, or for any succeeding tutor, to make appearance, and upon cause shown, to open up the audit of all accounts which have been audited by the accountant in absence of such party or succeeding tutor, and also all questions in the accounting which have either not been submitted to the decision of the Lord Ordinary or the Court, or been reserved, and also all questions which have been decided merely as between the accountant and the tutor, or between the tutor and some other beneficiary, reserving always to the tutor and his representatives their answers and defences, as accords of law; but if such party or succeeding tutor shall so appear, and such question shall be opened up and decided, the judgment, if pronounced, between the tutor and a party beneficially interested shall be final and conclusive as between them and their representatives, and if pronounced between the tutor and succeeding tutor, shall be final and conclusive against the tutor and the estate.'

Diligence prestable by

Exact diligence is in the ordinary case required of tutors. But

(*a*) Secs. 15 and 16.

it is enacted (sec. 14), 'That the accountant shall have power upon report to and with the approval of the Lord Ordinary, where the sum involved exceeds £20, and without such report and approval where the sum involved is less than £20, to dispense with the rules of exact diligence in any matter of tutorial management.'

tutors-at-law and dative.

The tutor is required (sec. 5) to lodge the money in his hands in some one of the banks in Scotland established by Act of Parliament or royal charter in a separate account or on deposit; such account or deposit being in his own name as tutor. A penalty of twenty per cent. on the excess over and above £50 is imposed where the factor has retained in his hands more than £50 of money belonging to the estate for more than ten days; and unless such retention in his hands has been from innocent causes, he is to be dismissed from office. The Accountant of Court is entitled to inspect any account opened in any bank by the tutor for the estate (sec. 33); and the bank is required (sec. 37) to accumulate the interest of all monies in their hands belonging to the tutory, whether on deposit receipt or on account-current, with the principal sum, so that both shall thereafter bear interest as principal.

Lodging of monies in bank.

At the close of his office, the tutor (sec. 34) may present a petition to the Court for his discharge, calling all persons interested in the estate, so far as known to him, as parties to such petition. Of this petition the Court orders such intimation and service as they think fit. The parties so called, or any others showing right and interest, may enter appearance, and upon cause shown, may open up the audit of the tutor's accounts. In this final audit, at the termination of the tutory, the tutor or his representatives, or any succeeding tutor, or any parties beneficially interested in the estate, may (sec. 15) enter upon the matter of objection stated for the tutor or his cautioner at any annual audit of accounts, if the same has been reserved; but if the same was decided by the Lord Ordinary or the Court, the decision cannot be opened up except upon cause shown. Parties having entered appearance, and such matters of objection being stated, the Court (now the Lord Ordinary), after receiving the report of the accountant, and making any further inquiry which may be necessary, shall pronounce judgment thereon (sec. 34); such judgment, if it shall discharge such tutor, being declared to be final and conclusive against all parties

Final accounting at the close of the tutory.

concerned, though pronounced in absence, provided the same shall not be opened up as a decree in absence in the Court of Session within the time limited for appealing to the House of Lords, or shall not be appealed from within that time.

PART SECOND.

MINOR AND CURATOR.

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CHAPTER I.

MINORS WITHOUT CURATORS.

THE terms *minor* and *minority* are, in a comprehensive and generic sense, applied sometimes to that period of life under twenty-one, which is contradistinguished from majority; in their more limited application, they are used to denote the age between pupillarity and majority,—from fourteen in males, and twelve in females, to the age of twenty-one years. It is in this latter sense that they are here employed.

Minors *puberes* have the same powers as persons of full age.

The law of Scotland holds that minors *puberes* are capable of managing their own affairs, without being authorized by any other party. They are regarded as having sufficient capacity for the ordinary business of life, but not possessed of that matured understanding and experience necessary to render their deeds unchallengeable under all circumstances. Though their deeds be valid, yet such deeds are liable to reduction, if it can be shown, that in granting them their inexperience had been taken advantage of, to their wrong; thus giving rise to the law of *restitutio in integrum*. But except under this condition, the deeds of minors are as valid and unimpeachable as those of persons of mature age, or of minors with curators (*a*). 'In puberty, legal incapacity has come to an end;

(*a*) Craig i. 12, 30; Stair i. 6, 32, *in fin.*; Bankt. i. 7, 52; Ersk. Prin. i. 7, 6; Ersk. i. 7, 33; *dictum* of Fount. in 2 Sup. 626.

and though the law places minors *puberes* under guardianship, they can themselves legally act, in all cases with the advice and consent of their guardians, and in some cases without any aid or consent. That they are considered legally capable to a certain extent of exercising their own unaided judgment, cannot be better illustrated than by the consideration, that after the death of the father a *minor pubes* is entitled to choose his own curators at the sight of the Court; that this right before the statute 1696 could not be interfered with, or exercised by anticipation, by the father; that even under the statute the father can name curators to the child only in *liege poustie*; and that, whether the curators be named by the minor himself or by his father, he is entitled to choose his own place of residence without their consent, or even against their advice' (*a*).

Deeds which a minor may execute.

In particular, a minor may, without curators or guardians, enter into marriage (*b*) or other contracts (*c*); become a partner of a company (*d*); present to a church (*e*); grant bills, bonds, or other personal obligations (*f*); borrow money, and dispone his property in security of the payment (*g*); let his heritage in lease (*h*); uplift his rents and interests (*i*); be the petitioning creditor in a sequestration, or be himself rendered bankrupt and sequestrated (*k*); sell his pro-

(*a*) *Per* Lord Justice-Clerk (Inglis) in *Harvey* v. *Harvey*, 22 D. 1208.

(*b*) Fraser, Pers. and Dom. Rel. vol. i. p. 42 *seq.*; Ersk. i. 7, 33.

(*c*) *Blythman* v. *Murray*, 1 Sup. 405 (1649); *Craig* v. *Grant*, M. 9035 (1732); *Wilkie* v. *Dunlop and Co.*, 28 Feb. 1834, 12 S. 506; *Argo* v. *Smarts*, 16 June 1853, 1 Irv. 250. An objection to a conviction under 4 Geo. IV. c. 34, that suspender was minor at date of contract, was repelled. 'Courts of law will unquestionably set aside a contract by a minor, where it is clear that advantage has been taken of him. But here, where a contract is entered into by a young man seventeen years of age, and withal so skilful a workman that he earns 20s. a week in Glasgow, it cannot be said that such protection is necessary. There is really nothing in this objection.'—*Per* Lord Justice-Clerk (Hope), *ibid.*

(*d*) *Duncanson* v. *Duncanson*, M. 8928 (1715).

(*e*) Connel on Parishes, p. 520; Ivory's note to Ersk. i. 7, 33, note 227; More's notes to Stair, xliii.

(*f*) *Craig* v. *Grant*, *supra*; *Grieve* v. *Tait*, M. 9036 (1732); *Waddell* v. *Gibson*, 18 Jan. 1812, F. C.; *Campbell* v. *Turner*, 24 Jan. 1822, 1 S. 266; *Crawford* v. *Bennet*, 19 June 1827, 2 W. S. 608.

(*g*) *M'Donald* (1789), M. 9038; *Dempster* v. *Potts*, 30 and 31 Dec. 1837, 15 S. 364, 12 F. C. App. 25.

(*h*) Craig i. 12, 30; Bankt. i. 7, 52; Ersk. i. 7, 33; 1 Bell's Com. 134. *Thomson* v. *Stevenson*, M. 8982 (1666); *dictum* in *Clerk* v. *Gordon*, M. 3668 (1699).

(*i*) Ersk. i. 7, 33, note by Ivory; *M'Nab* v. *Culdair*, 4 Sup. 237 (1695).

(*k*) *Miller* v. *Aitken*, 13 June 1840, 2 D. 1112.

perty, heritable and moveable, by his own deed, without judicial authority or the consent of friends (*a*); institute or defend actions in his own name; but, in such a case, a curator *ad litem* will be forced upon him if he appear in the suit, but not if he enter no appearance (*b*). He may also obtain decree of *cessio bonorum* (*c*), make a testament (*d*), renounce a succession to which he is heir (*e*), gift all his moveable property to whomsoever he may please (*f*), and incur a passive title by vitious intromission, which neither a pupil nor his tutor can (*g*).

Power of minor to uplift debts.

The only part of a minor's rights which calls for particular remark is the right to uplift debts due to him. As to his powers in this respect, there have been contradictory decisions. The difficulty here arises from the hardship that would be imposed upon the debtor who has paid his debt, were he afterwards subjected to second payment, on the first being reduced from facility and lesion. It would be hard even to leave him open to the risk of after challenge, when he himself may not be insisting on tendering the payment. In this respect the transaction is different from a sale of the minor's estate, which may also be reduced on lesion. When a major buys property from a minor, he contracts ultroneously, knowing the risk of ultimate challenge. Not so, however, a debtor of a minor. In the first case, where the point was raised, the minor, with consent of his *quondam* tutor, in whose favour a bond for the pupil's money had been taken, charged for payment of the bond after he attained puberty but not majority, and was met by the objection that he had no curators. The Lords, however, found that the money being payable to the *quondam* tutor, the interposition of his authority was sufficient warrant for the debtor to pay (*h*). In the next case, the minor's administrator-in-law was

(*a*) Craig i. 12, 30; Stair i. 6, 44, 6th sentence; Bankt. i. 7, 52; Ersk. i. 7, 33. *Clerk's Crs.* v. *Gordon*, M. 3668 (1699); *Kincaid* v. ———, M. 8979 (1561); *Thomson* v. *Stevenson*, M. 8982 (1666); *Glentoris* v. *Kirkpatrick*, M. 8978 (1543); *Grandiston* v. *Lawson*, M. 8978 (1561).

(*b*) *M'Lagan* v. *Wallace*, 11 Dec. 1829, 2 Jur. 96; 1 Bell's Com. 134. See *Johnstone* v. *Lindsay*, 11 June 1830, 2 Jur. 464. See *supra*, p. 156 *seq.*

(*c*) *Gray* v. *Purves*, Hume 411 (1816).

(*d*) Bankt. i. 7, 59; Dirl. p. 433, 434; Ersk. i. 7, 33. See *infra*, where this is considered fully in this Part.

(*e*) *A.* v. *B.*, M. 8969 (1631).

(*f*) *Kincaid* v. ———, M. 8979 (1561); Ersk. i. 7, 33.

(*g*) *M'Eachern* v. *M'Eachern*, 26 Feb. 1833, 11 S. 441; *Kerr* v. *Bremner*, *supra*, p. 278, as in (*f*).

(*h*) *Watt* v. *Panton* (1697), M. 8971.

out of the kingdom; the debtor in an heritable bond wished to pay it up, and accordingly applied by bill of suspension, craving that he might be authorized by the Court to consign, or to pay up the money on getting a valid renunciation, and that the minor should be ordained to choose a curator, to concur with him in the renunciation. The minor got a curator *ad litem* appointed to him; and a new security was offered for the money. And the Court authorized the minor to receive and discharge the money, on their being satisfied as to the value of the new security (*a*). In the next case, the Court avoided determining the general question, whether one who is past pupillarity, and has not curators, may discharge an heritable debt; 'but they generally agreed in this, that no cautious debtor would venture to pay a minor without curators otherwise than *auctore prætore*' (*b*). In a subsequent case the Lord Ordinary found 'that, by the law of Scotland, a payment made to a minor not having curators is a valid and effectual payment.' To this judgment the Lords adhered (*c*). But the last case on the point sanctioned a directly opposite rule. It settled that, although a minor might uplift the interests and profits, he could not, without curators or judicial sanction, uplift the principal sum (*d*).

Court will not interfere by granting power to minor to sell his estate.

It was at one time the practice, when minors wished to sell their estate, to apply, in like manner as tutors, for the authority of the Court; and such authority has been granted (*e*). The object of this was to induce purchasers of respectability to come forward, as they could thus more easily establish their *bona fides* in the event of after challenge. But the Court, on the ground that the minor himself, or along with his curators (when he has them), can sell without judicial authority, and that no decree of theirs can prevent a reduction by the minor, now refuse to interpone their authority (*f*). Under the provisions of the Entail Amendment Act, a minor heir of entail cannot give his consent (if he be not authorized by a curator appointed for that purpose) to any alienation of the entailed estate (*g*).

(*a*) *Morison* v. *Stewart*, M. 8972; Elch. Jurisdiction 40 (1747).

(*b*) *Hay* v. *Grant*, M. 8973 (1749).

(*c*) *Koehler* v. *Neidrick*, M. 8975 (1772).

(*d*) *Kirkman* v. *Pym*, M. 8977, and Hailes 909 (1782).

(*e*) *Campbell* v. *Campbell*, M. 8930 (1738).

(*f*) *Wallace* v. *Wallace*, 8 March 1817, F. C.

(*g*) 11 and 12 Vict. c. 36, ss. 3, 4, 5, and 31; and 16 and 17 Vict. c. 94, ss. 3, 4, 5, and 18. See *infra* as to

Minor's acts may be reduced on lesion.

In every transaction with a minor there is this disadvantage, that it may be afterwards reduced on the head of lesion; and in particular, with reference to payments made to the minor for property purchased from him, or to discharge debts due to him, the party paying the money must show that the minor, after receiving it, profitably employed it for his own use. And therefore the practical rule would be, never to pay without authority of the Court, which might be done under a suspension of a threatened charge (*a*). In saying, therefore, that they may competently perform all the acts now enumerated, or in general all the acts competent to one *sui juris*, it must be taken under this qualification, that if the minor can prove lesion in an action raised within the *quadriennium utile*, each and all of the acts done by him will (under certain exceptions) be set aside.

Minor may be imprisoned.

A minor thus entitled to act as a major incurs also the same liabilities as a major for non-performance of his contract. He may be imprisoned for non-implement of obligations *ad factum præstandum*, or for non-payment of debts (*b*). It has been found that a decree against a pupil undefended is not null, but, like any other decree in absence, can be opened up within forty years (*c*). *A fortiori*, a decree against a minor is valid, though no appearance be made for him (*d*).

Reference to minor's oath.

It is as competent to refer any matter to the oath of a minor as it is, in the like circumstances, to majors (*e*). And where a minor has curators, a reference to oath is made to the oath of the minor, not of the curators (*f*). But to this an exception has been stated, as to the case where the matter to be referred has relation to a debt incurred when the minor was a pupil. Here the Court held, that he could not have knowledge of it, and could not therefore be compelled to depone as to whether or not it was resting owing (*g*).

consents by guardians appointed under these Acts to minors.

(*a*) *Kirkman* v. *Pym*, *supra*; *Thomson* v. *Stevenson*, M. 8982 (1666); *Houston* v. *Maxwell*, M. 8986 (1631); *Ruthven* v. *Gray*, M. 31 (1672).

(*b*) *Thomson* v. *Ker*, M. 8910 (1747); *Wilkie* v. *Dunlop*, 28 Feb. 1834, 12 S. 506.

(*c*) *Supra*, p. 156.

(*d*) *Craig* v. *Cockburn*, M. 8980 (1583).

(*e*) *Mar* v. *his Vassals*, M. 8918 (1628); *Maitland* v. *Caschogill*, M. 8917 (1623).

(*f*) *Forbes* v. *Pitsligo*, M. 8920 and 12479 (1628); Dickson on Evidence, s. 1502.

(*g*) *Kinneir* v. *Rae*, M. 8918 (1623); *Somervill* v. *his Debtors*, 2 Sup. 497

How far a minor may alter succession to heritage.

Though a minor may test upon his moveables, however valuable, *etiam in extremis*, and though he may sell his heritage, and otherwise dispose of it for onerous causes, yet he cannot gratuitously convey it away to any other but his heir-at-law.

In a sale, the transaction may be necessary; the price received affords a good criterion of the fairness of the transaction; and if the judgment of the minor does not protect him from an unfavourable bargain, he can be restored against it. As to the power of testing, this has probably arisen from the small value of moveables in the early period of the law when the rule was settled. It is different with regard to heritage. A gratuitous alienation is *ipso jure* null, according to a rule derived from a different source, or at least one regulated by different principles from that which allows him to reduce deeds to his lesion. The succession by law being settled, there can be no *necessity* for its being altered; and generally there is no expediency in the alteration. And if it be altered, by any deed to take effect after the death of the granter, there is no party who can pretend any onerous right, or can allege any injustice, where the deed fails of effect. On the other hand, the general rule of succession fixed by law must be presumed to be the best, and ought not to be allowed to be altered but with deliberation, and at a time when the proprietor is every way capable of judging of the grounds on which such an alteration should take place. Further, as it is only by one's own *will* that the law will permit the ordinary course of succession to be changed, it is plain that in this point he can have no assistance, either from a curator or any other person. This rule of law seems to originate in the doctrine concerning the deliberation and judgment necessary for changing the legal course of succession, though it is confirmed and extended by feudal notions. Nothing is so plain in the Roman law, as that this incapacity, or *want of power*, from presumed incapacity of acting under the age fixed to make a testament, arises from a want of *animus*, or sufficient understanding (*a*). The doctrine of *restitutio in integrum* has no connection with the incapacity to dispone *mortis causa*, and the privilege of reduction on the head of minority and lesion is just as different from it in the law of Scotland. A *mortis causa* deed is

(1670); *Anderson* v. *Crs.*, or *Little* v. *Graham*, 4 Feb. 1826, 4 S. 424.

(*a*) Voet. xxviii. 1, 31.

set aside, not on the head of lesion or of presumed lesion, but simply on the ground, that as such a deed must proceed from the will of the testator himself; and as a minor, whether with curators or without, is held not to have sufficient understanding, or the proper *animus disponendi*, in respect to his heritable estate, a deed of that nature, executed by a minor, is null or reducible for want of power in the granter.

The decisions on this subject illustrate these principles. A landed estate, by the ancient destination, was settled to a particular series of heirs; an heir of the age of seventeen altered this destination, and died before majority. The Court held the law to be perfectly fixed, and the deed of alteration was reduced (*a*), in accordance with the prior authorities (*b*).

But the deed need not be *mortis causa;* if its sole object be the alteration of the succession, it will be set aside though it be a procuratory of resignation *inter vivos*, followed by a new investiture (*c*).

How far minor can alter moveable succession to prejudice of heir.

Lord Kilkerran was also of opinion, that it was not in the power of a minor gratuitously to dispose of his moveables, in prejudice of the relief of his moveable debts competent to his heir, from his moveable subjects (*d*). It has been found, that when moveable debts have been conveyed to a minor, with a substitution after him, to near relations of the granter, the substitution is equal to an implied prohibition, which the minor cannot alter (*e*).

The most important and marked illustration of the doctrine, that the deeds of a minor altering the succession to his heritage will be set aside, not on the ground of minority and lesion, and consequent *restitutio in integrum*, but because he had no power or capacity to grant such deeds, is found in the doctrine sanctioned by an unreported decision. A minor executed a settlement altering the destination to his estate, and died after majority, and after the

(*a*) *Cunynghame* v. *Whitefoord*, M. 8966 (1797).

(*b*) Stewart's Answers, *v.* Minor; Bankt. i. 7, 54; Ersk. i. 7, 33; *Clydesdale* v. *Dundonald*, M. 8964 and 1265, and Robertson's Appeals, p. 564 (1726); *Hunter* v. ——, M. 8964 (1728).

(*c*) Dirleton and Stewart, p. 289; cases in (*b*); *M'Culloch* (1731), M. 8965.

(*d*) *Craig* v. *Lindsay*, M. 8956 (1757), interlocutor of Lord Ordinary. The Court settled the case upon another ground.

(*e*) *Yorkston* v. *Burn*, M. 8950 (1697); *M'Culloch* (1731), M. 8965; *Waddell* (1739), M. 8965.

quadriennium utile expired, leaving the settlement unchanged. The question then came to be, whether this deed could be held homologated tacitly; or whether it was still reducible, as if he had died in minority, or the reduction had been intented before the *anni utiles* had expired. The Court adopted the latter view, and accordingly set aside the deed (*a*).

In certain onerous transactions, however, a minor may alter the old investitures of his estate without selling it; as, for example, by a new destination in his marriage contract (*b*).

How far a minor can hold public offices.

The minor is allowed as extensive powers as a major only in the management of his own affairs, and in that case merely in cases of necessity; the prohibition against *mortis causa* settlements of heritage illustrating this. In reference to the affairs of others, a minor lies under various disabilities, having reference chiefly to the discharge of administratorial duties. For it would be incongruous to allow a minor to act for another, so as irrevocably to bind his constituents in matters which, if they had been his own, he could have executed only by giving the party with whom he deals a title liable to reduction on minority and lesion. In the discharge of offices, too, of a public or *quasi* public nature, a mature judgment in the conduct of affairs may be obtained without employing minors; and while no necessity exists for resorting to them, the law holds in all cases of the nature now referred to, that the officer must be of the perfect age of twenty-one years. In certain cases, parties under a *civil* incapacity to act for themselves, such as married women, may yet be trustees, factors *loco tutoris*, or agents for others (*c*); but the rule is different with regard to *natural* incapacity. Minors are not eligible for the office of town councillor, or entitled to vote as members of any corporation for the office of deacon, nor in any stage of a burgh election (*d*). 'Minority is certainly a disqualification, and one which can hardly be regarded as a latent disqualification.

(*a*) *M'Farlane* v. *Hartley*, 23 May 1811, Hume's Session Papers, vol. titled 'Summer 1811,' No. 19. See, as to a minor's power to submit to arbitration questions relating to his succession, Montgomerie Bell, Arbitration, pp. 105, 106.

(*b*) *Muirhead* v. *Muirhead*, M. 8955 (1724).

(*c*) Fraser, Pers. and Dom. Rel. vol. i. p. 242. See *infra* as to factors.

(*d*) Wight's Election Law, p. 156; *Rodgers* v. *Henderson*, M. 1860 (1761); *Jeffray* v. *Stirling*, 5 Sup. 712, and M. 7681 (1741); *Ogilvy* v. *Edinburgh*, 6 Feb. 1810, F. C.; *Kidd* v. *Anstruther-Wester*, 17 Dec. 1852, 15 D. 257.

It may *de facto* be unknown that a person elected is a minor, but the law does not hold minority to be a latent disqualification. I hold this to have been an election of fourteen councillors' (*a*). 'It is clear that one of the parties elected was disqualified. The disqualification of minority is absolutely fatal. The want of one member has rendered the council incomplete' (*b*). A minor cannot be elected trustee on a sequestrated estate (*c*). It has been said that a minor can be a notary-public and messenger-at-arms (*d*); and in support of this doctrine two decisions are referred to, which, however, do not support it. In these cases minors had granted bonds, which they wished to reduce on the head of minority and lesion; they were, *inter alia*, met by the defence that they were notaries and messengers, and consequently were to be presumed to know the nature of the transaction they were entering into. But there appears to have been no decision finding that a minor could competently hold these offices (*e*); and it will be judged, from the analogous cases already stated, whether the remark of Professor More on these two decisions is not justified. 'It may be doubted,' he says, 'how far minors can lawfully be appointed to such public offices.' In his Lectures (*f*), Professor More says, in reference to these cases, 'such a decision would not now be pronounced.' A minor cannot be a judge in any court, though it was once held that he might be an arbiter (*g*); a doctrine inconsistent with the Regiam Majestatem (*h*), with the Roman law (*i*), with the later authorities (*k*), and which was only carried in the infancy of the law by the casting vote of the President of the Court. The only ground on which such a nomination could be supported would be that the parties had pleased themselves, and must abide by the result. But, on the other hand, where there is merely an agreement to submit eventual claims and disputes to arbitration, as is often the case in leases; or where, under the Lands Clauses or other statutes, dis-

(*a*) *Per* Lord President M'Neill in *Kidd* v. *Anstruther*, 17 Dec. 1852, 15 D. 257.

(*b*) *Per* Lord Ivory, *ibid.*

(*c*) *Threshie*, 30 May 1815, F. C.

(*d*) More's Notes, p. xlii.

(*e*) *Gairdner* v. *Chalmers*, M. 9024 (1636); *Corsar* v. *Deans* (1672), M. 8944 and 9026.

(*f*) Vol. i. p. 111.

(*g*) *Gordon* v. *Errol*, M. 8915 (1582). See Montgomerie Bell, Arbitration, pp. 124, 125; More's Lectures i. p. 111.

(*h*) Reg. Majest. lib. ii. c. 4, No. 4.

(*i*) Nemini licere minorem viginti annis compromissarium judicem eligere. Dig. iv. 8, 41; Dig. xlii. 1, 57.

(*k*) More's Notes, p. xlii.

puted claims are appointed to be settled by arbitration, and a power is given to each party to name an arbiter, there can be no doubt that either party might successfully object, on the ground of minority, to the person proposed as arbiter by the other (*a*). The appointment of a minor as oversman by the arbiters named would also be incompetent.

A minor cannot hold any office where the judicial functions form part of his duties, such as commissioner of supply (*b*), juror (*c*), or any subordinate office about the courts of law, where skill and maturity of judgment are necessary (*d*). The Court, however, with some division of opinion, have held that a minor may be a sheriff-clerk substitute. The case was as follows:—A lad of seventeen years of age was appointed sheriff-clerk substitute of Shetland, and in that capacity had improperly, though in *bona fide*, misapplied money which came into his hands in the course of his official duties. For this the principal sheriff-clerk was sued and found liable; and having brought an action of relief against his minor substitute, the latter pleaded that he was inexperienced in such matters, had acted in *bona fide*, and that his minority ought to protect him. The majority of the Court were of opinion, that the case came under the general rule of law, by which it is established that a minor, whenever he undertakes an employment by which he gains his livelihood, becomes responsible, as well to his employer as to the public, for all his acts done in that situation. If the rule were otherwise, it was maintained that it would be most hurtful to minors, because if they were free from responsibility nobody would employ them, and they would be shut out from many situations and offices, the duties of which they now discharge (*e*). This judgment, however, was given against the opinion of Lords Meadowbank and Robertson, who held that in a question with the master at least, a raw lad of seventeen could not be liable, though he failed in discharging the duties of such an office; and it is contrary to the law of England. Thus it has been held, that a minor cannot be appointed clerk of a Court of Requests,

(*a*) See Montgomerie Bell, p. 126.

(*b*) *Hay* v. *Hepburn*, M. 8929, Elch. v. Com. of Supply 1 (1735).

(*c*) See *Glennan and Bradley*, susprs., 15 March 1830, 2 Jur. 382.

(*d*) *Murray*, Elch. v. Minor, No. 9, and Public Officer, No. 12 (1743).

(*e*) *Heddell* v. *Duncan*, 5 June 1810, F. C.

where it is a part of the duties of that office to receive the money of the suitors (*a*). A minor cannot be a physician, surgeon, or apothecary, as all the bodies entitled to grant diplomas for these professions insist on majority as a qualification. He cannot be a tutor or curator (*b*); but there is no authority finding that he cannot be a trustee in a private trust. He cannot be a member of Parliament, or an elector qualified to vote (*c*). A claimant under age cannot be enrolled as a voter, even under condition that he does not exercise his privilege till he come of age (*d*). It would, however, appear, that if the disability existed only at the time of giving in the claim, but ceased before the sitting of the registration court at which it was considered, the claimant might be enrolled (*e*).

(*a*) *Claridge* v. *Evelyn*, 5 B. and Ald. 81.

(*b*) *Supra*, p. 169. In *Marquis of Montrose* (1695), 4 Sup. 277, 'the Lords thought she (the mother) being clad with a husband, could no more be a curator than a minor could be, not having a person in law.'

(*c*) Rogers on Elections, p. 45, 3d ed.; Bell on Election Law, p. 11. See the Reform Act, 2 and 3 Will. IV. c. 65, ss. 36, 37, read in connection with 1681, c. 21, and 1707, c. 8.

(*d*) *Macleod* v. *Gordon*, M. 8684, No. 107, and 5 Sup. 926 (1765); Bell on Election Law, pp. 338–9.

(*e*) Cay's Analysis of the Reform Act, p. 17; More's Lectures i. 111.

CHAPTER II.

CONSTITUTION OF THE OFFICE OF CURATORY.

A CURATOR is a person appointed to assist a minor in the administration of his property with his advice and counsel. The term is also applied to the guardians of lunatics, and also, but not so correctly, to a husband in relation to his wife (*a*).

Who may be curators.

I. Persons competent for the office of tutory may also be appointed curators. And the converse holds, that they who cannot be appointed tutors are ineligible as curators (*b*). In particular, it has been decided that unmarried women may be curators (*c*), but not those who are married (*d*), nor outlaws (*e*); but it is no objection that the curator is resident abroad (*f*); and he is eligible at majority. It will save a needless repetition of the same rules, to refer to the statement made in a previous part of this work relative to the qualifications of tutors. They are the same as regards curators (*g*).

How appointed.

II. Curators are appointed in four ways: 1. *Ipso jure;* 2. By nomination of the minor's father; 3. By the minor's choosing curators for himself; 4. By the Court.

Ipso jure. Father as curator.

(1.) The father is the administrator-in-law of his legitimate children, and as such he is both their tutor and curator (*h*). His appointment and administration as tutor has been already con-

(*a*) Fraser's Pers. and Dom. Rel. vol. i. pp. 246–7.

(*b*) Ersk. i. 7, 12; Bruce's Tutor's Guide, p. 176.

(*c*) *Johnston* v. *Johnston*, M. 16222 (1550); *Balfour* v. *her Dochteris*, M. 16222 (1550).

(*d*) *Marquis of Montrose*, 4 Sup. 277 (1695).

(*e*) Stair i. 6, 30 *in fin.*

(*f*) *Earl of Dalhousie*, 4 Sup. 405 (1698).

(*g*) *Supra*, p. 169.

(*h*) Stair i. 5, 12, and i. 6, 35 *in fin.;* Bankt. i. 6, 2; Ersk. i. 6, 54 and 55; Bell's Dict. *v.* Curatory. *M'Kenzie* v. *Fairholm* (1666), M. 8959 and 8982; *Bell* v. *Sutherland* (1728), M. 8985; *Thomson* v. *Pagan* (1781), M. 8985.

sidered (*a*), and here it is proposed to treat of what more particularly relates to his actings after pupillarity.

A father, acting as curator, is not bound to make up curatorial inventories, nor to make oath *de fideli administratione officii*; nor is he liable for omissions or neglect of management, but only for his actual intromissions; nor is he bound to find caution, unless he be *vergens ad inopiam*, in which case the Court may compel him to do so (*b*). He is administrator *ipso jure*, and requires no judicial proceeding, or other form of appointment, to vest him with the office of curator (*c*). His right to the office is so omnipotent, that the minor cannot choose curators for himself during the father's life, if the latter claim the office; and his right would not be affected by the circumstance (under the exception afterwards explained), that the child was possessed of property not flowing from him, and the profits of which belonged to the child alone. The father's powers extend over all property from the administration of which he is not expressly excluded (*d*).

When child may have curators, though father be alive.

There are, however, several cases where, the father being alive, his child may have other curators than him. 1. Where the father resigns his right, and gives his consent to the minor choosing curators for himself (*e*).

2. If the minor have an interest adverse to the father, a curator *ad litem* will be appointed *pro hac vice*, who will assist him in conducting the suit necessary for extricating the rights of parties (*f*).

(*a*) *Supra*, p. 65, and p. 164.

(*b*) Bell's Dict. *v.* Curatory; Ersk. i. 6, 55; Stair i. 5, 12; Bankt. i. 6, 2 and 4; *supra*, p. 164.

(*c*) Stair i. 5, 12, and i. 6, 35 *in fin.*; Bankt. i. 6, 2; Ersk. i. 6, 55.

(*d*) Stair i. 5, 12; Elch. Annot. p. 32; Bankt. i. 6, 2; Ersk. i. 6, 54, and i. 7, 11. *Pitcairn v. Curators*, M. 16339 (1731); *dictum* in *Drumore*, petrs., M. 16349 (1744); *Bartholomew* v. *Bartholomew*, 2 Sup. 280 (1681), contrary to Dirleton's opinion in *M'Kenzie* v. *Fairholm*, M. 8962.

(*e*) Stair i. 5, 12; Ersk. i. 6, 54. See App. for a case not yet reported.

(*f*) Ersk. i. 6, 54; *Bartholomew* v. *Bartholomew*, 2 Sup. 280 (1681); *Bargeny* (1627), M. 10418; *M'Neill* v. *M'Neill* (1798), M. 16384; *Graham* v. *Peter Wilson, jun.*, March 1865, unreported, where the Court, on its emerging in the course of the discussion that the suspender was a minor, his defence being that his father, and not he, should have been charged on the bill, appointed a curator *ad litem* to the minor. See also *Stirling*, 16 Dec. 1851, 14 D. 206, where, in an entail petition, a minor being one of the three next heirs of entail, the Court refused to sustain as sufficient an intimation on the father as curator, he being also one of the next heirs of entail, but appointed a curator *ad litem* and intimation to him.

Where, also, a father refuses to concur with a minor child who is pursuer of an action, the Court will appoint a curator *ad litem* (*a*). 3. Where a father is bankrupt and in prison, or where his circumstances are such that he would dilapidate the child's means and rents if he were suffered to intromit, the Court will allow the minor to choose another curator (*b*). 4. Property may be left to a minor under the condition that the father shall not have the administration of it, in which case the minor may choose curators for himself. Or the person leaving the property may appoint curators, or rather trustees, to manage it. To the extent of that property, therefore, the father's curatorial powers are excluded (*c*). 5. Although her father be alive, his right of curatory, as well as that of other curators, falls or is suspended by the marriage of a daughter, who is, *eo ipso*, transferred to the guardianship of her husband (*d*). 'A girl, by her marriage, only exchanges one curator for another. She passes from the guardianship of her father to that of her husband' (*e*). The father's right of curatory, or that of other curators, revives on the husband's death.

To what children is the father curator.

The father is curator only to his immediate children; in other words, a grandfather is not curator to his grandchildren (*f*). The children must be legitimate. A father is not curator himself, nor can he appoint curators to his bastard issue. They are entitled to choose curators for themselves, notwithstanding that the father be alive, or that an appointment of guardians has been made by him (*g*). It would seem that where the children are forisfamiliated, married, or residing *extra paterna familia*, and earning a livelihood for themselves, the father is not their curator. Erskine states the doctrine broadly: 'Forisfamiliation, when understood in this sense, is also inferred by the child's marriage, or by his living in a separate house with his father's consent or permission.' 'The

(*a*) *M'Conochie* v. *Bennie*, 2 March 1847, 9 D. 791.

(*b*) *Barclay*, petr., 1698, 4 Sup. 405.

(*c*) See this fully considered, *supra*, p. 80, and p. 175; Ersk. i. 6, 54.

(*d*) Bankt. i. 6, 8; Ersk. i. 6, 54; *Sinclair* v. *Sinclair* (1564), M. 16229.

(*e*) *Per* Lord Justice-Clerk (Inglis) in *Harvey* v. *Harvey*, 15 June 1860, 22 D. 1208.

(*f*) Stair i. 6, 6; Bankt. i. 6, 9; Ersk. i. 6, 55. *Harpers* v. *Hamilton*, M. 16262 (1633), and other authorities, *supra*, p. 165, and p. 174.

(*g*) *Wilson* v. *Campbell*, 10 March 1819, F. C.; Ersk. i. 6, 55; *supra*, p. 123, and p. 165, and p. 175, and p. 185.

father's administration is restricted, with us, to such of his children as continue in family with himself; and a child is, as to this question, held to continue in his father's family, though he should reside elsewhere, if he earns not his livelihood by his own industry and labour, independent of any aid from the father' (*a*). Bankton, however, says: 'Marriage, by the laws of most nations, liberates children from the power of their father; but did not by the civil law, nor to all effects does it by ours; because a minor remains still under the power of his curators, even after marriage, to whom the father, as administrator-in-law, is equal' (*b*). But Stair, on the other hand, agrees with Erskine. For while in one passage he says, 'A father is also curator to his children, especially when in his family;' in another, where he treats of the father's power to compel the children to live in family with him, and carries this power even beyond majority, he adds, 'Unless they be *forisfamiliat* by marriage, or by education in a distinct calling from their parents, or unless their parents deal unnaturally with them;' 'or if the father countenance or allow the children to live by themselves, and to manage their own affairs apart, from whence his tacit consent to their emancipation may be inferred' (*c*). And it is plain, from the authorities cited in the first passage, that the cases in which the father's authority over children not living in family with him is maintained by Stair, are cases where the children, though living separate, are still dependent on, and in part supported by, the father (*d*). In the only case where the point seems to have occurred directly for decision, the Court did not decide it, holding on other grounds, and in the whole circumstances of the case, a reduction was not necessary, but that the question between the parties might competently be tried in a suspension. Lord Gillies, indeed, at first expressed himself strongly as of opinion that the father's administration continued, though the minor was married and had a house of his own; but he afterwards admitted that there was a good deal in the view stated by the Lord President. This was thus expressed: 'I have some doubts whether, under the cir-

(*a*) Erek. Inst. i. 6, 53 and 55; Prin. i. 7, 6.

(*b*) Bankt. i. 6, 8.

(*c*) Stair i. 5, 12 and 13.

(*d*) See cases cited in Stair i. 5, 12; also *Corser* v. *Deans* (1672), M. 8944; *Campbell* v. *Lovat* (1731), M. 9035.

cumstances of this case, the administration of the father was in existence at the date of the bill. The suspender was married, resided in a separate house, had property of his own, and consequently was forisfamiliated; at least I think, that in a question with a third party, it would be held that he must be regarded as forisfamiliated' (*a*). On the case being ultimately advised on proof, the Court decided in favour of the minor suspending the charge; but they did so on the ground that forisfamiliation at the date of granting the bill was not established. Lord Balgray observed: 'In this case the minority is not disputed, and I think the forisfamiliation not established. Had the son been his own master, and engaged in trade on his own account, and married, having a separate establishment, that would clearly have amounted to forisfamiliation. But that is not the case before the Court. The son is not *sui juris;* he remains an apprentice under the indenture to which he was bound with his father's consent. No doubt he makes a marriage three days before signing the note; but I do not think that circumstance can immediately alter the relations of the parties so materially as to exempt the father from the burden of proving that the contents of the note were applied for the son's behoof.' And Lord Gillies observed: 'It has been argued that the son was forisfamiliated, and living independently of the father. I cannot sustain that argument, and certainly not upon the mere fact that he had entered into marriage three days before signing the note. He still remained an apprentice under an indenture to which he was bound with his father's consent. He was not *sui juris*, but remained under the authority of the master to whom he was bound, and who was *quoad hoc*, the delegate of his father in exercising control over his actions. Whilst his apprentice, though necessarily living near him at Edinburgh, the minor remained in the same position, *quoad* forisfamiliation, as if he had continued at his father's house at Inverkeithing, and under his immediate control' (*b*). In another case, which related to the custody of a boy of sixteen years of age, the general rule of law applicable to such a case was thus laid down: 'A boy, above fourteen, by his marriage, not only becomes

(*a*) *Per* Lord President (Hope) in *Anderson* v. *Cation and Anderson*, 28 Nov. 1828, 7 S. 78.

(*b*) *Ibid.* 15 Nov. 1832, 11 S. 10.

at once and for ever emancipated from the paternal curatory, but by the same act becomes the curator of his wife. The very capacity of complete emancipation shows how feeble is the hold of the *patria potestas* over a child in puberty, as compared not only with the same authority during the child's pupilage, but with its exercise at all ages of children in the earlier Roman law, and at one time even in the law of Scotland' (*a*).

The principle upon which this doctrine, when the child is forisfamiliated, proceeds, seems to be that the father, by allowing the son to live separately from him, or to marry, is held to have resigned his curatorial office. It has been said that the mere circumstance of the minor's marriage does not infringe upon the powers of ordinary curators over a minor husband (*b*), and fathers differ in nothing from them; but the father's consent to the marriage, or to the child setting up a separate establishment and home, may be regarded as a tacit resignation of the office of administrator-in-law. The pure case, however, has never arisen for decision, although it is thought that, if it did arise, the opinions of the institutional writers would be followed.

Husband as curator.

A husband becomes by marriage the guardian of his minor wife, and the curatory of others over her immediately terminates (*c*). A husband does not require to find caution, or to make up inventories as ordinary curators do (*d*). When a wife has attained majority, she is not under the curatory of her husband, although every deed of hers (speaking generally) must be granted with his consent.

Testamentary curators.

The *common* law of Scotland denies to fathers the power of nominating curators to their children, following in this respect the law of Rome (*e*). The power, however, was one which would

(*a*) *Per* Lord Justice-Clerk (Inglis) in *Harvey*, *supra*. See also Prof. More's Lectures i. p. 87.

(*b*) Bankt. i. 7, 61; Wall. 366.

(*c*) Fraser, Pers. and Dom. Rel. vol. i. pp. 238 and 244–245; Bankt. i. 7, 58; Ersk. i. 7, 29. *A.* v. *B.*, M. 8929 (1724); *Sinclair* (1564), M. 16229.

(*d*) *A.* v. *B.*, M. 8929 (1724).

(*e*) Stat. 1555, c. 35, 'and *desires* curators.' Stair i. 6, 24 and 32; Bayne's Notes, p. 29; Bruce, Tutor's Guide, pp. 182 and 184; Bankt. i. 6, 3, and i. 7, 67; Ersk. i. 7, 11, and i. 6, 54. *M'Kenzie* v. *Fairholm*, M. 8961, Dirleton's Report (1666); *Anonymous*, 1 Sup. 554 (1675); *Scott* v. *Kennedy*, M. 8970, 1 Sup. 747 (1675); *Harpers* v. *Hamilton*, M. 16262 (1633). See also *per* Lord Curriehill in *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 268,

prove so beneficial to the minors themselves, that the Legislature interfered, and by the statute 1696, c. 8, conferred on fathers the right of nominating curators to their children, whom the latter are compelled to accept. The statute sets out with the preamble, that 'the father can make a better choice of curators for his children who are minors, than minors could make for themselves;' therefore it was ordained, 'That it shall be lawful for the father, by any act or deed in his *liege poustie*, to make a nomination of such persons as he thinks fit to be tutors, and of such persons as he thinks fit to be curators to his children during their minority.' 'And it is hereby declared, that where the same persons are named by the father to be both tutors and curators, it shall be lawful and free to those who shall accept and exerce the office of tutory, to decline and (*a*) accept as curators, after the pupillarity expires, as they think fit.' This latter provision was intended to induce tutors the more readily to accept that office, and had its warrant in the Roman law, whereby a person having been tutor, he had a relevant excuse against being compelled to accept the office of curator (*b*).

Forms of appointment.

The appointment may be made, where there are a number of curators, simply or jointly, with a *sine quo non*, or a quorum, or *sub conditione*, in the same manner as tutors (*c*). The rules by which curators appointed in any of these modes vote and act, have been already detailed in treating of tutorial appointments of this sort; and as the rules in both cases are the same (*d*), it will save needless repetition to refer to the previous part of this work, where they are already laid down (*e*). It will afterwards be considered whether, by the death of a *sine quo non*, or failure of a quorum, the whole nomination is at an end (*f*). Though the nomination of curators can only be made in *liege poustie* (*g*), yet it is still so far of a testa-

note. The words of the statute 1696, c. 8, prove this too; for while it sets out with stating that the father may name tutors, it says nothing on this head as to curators, although the enacting part applies to both.

(*a*) *Sic: and* means *to.*

(*b*) Inst. de Excus. Tutor, sec. 18.

(*c*) *Primrose* v. *Roseberry*, M. 16335 (1715); *Ramsay* v. *Maxwell*, M. 9042 (1672). Bruce, Tutor's Guide, p. 190; Ersk. i. 7, 15; *supra*, as to Tutors, p. 176 *seq.*

(*d*) Ersk. *ibid.*; *Primrose* v. *Roseberry*, *ibid.* See *Robertson* v. *Niven*, 17 Feb. 1829, 7 S. 421, as to the peculiarity in processes of multiplepoinding.

(*e*) *Supra*, p. 210.

(*f*) *Infra*, Part ii. chap. iii. sec. 5.

(*g*) Words of the statute 1696, c. 8, with these commentaries on it, Ersk.

mentary nature, that it may be revoked (*a*), except the father be on death-bed (*b*).

Power to limit common law liabilities of curators.

The statute, besides giving the father power for the first time to name curators, allowed him also, if he thought proper, to limit the common law responsibilities of such guardians. The statute says: 'Considering that tutors nominate by a father to his children are persons in whom he reposeth the greatest trust, and that the tutors-nominate frequently decline the office, being unwilling to subject themselves to the hazard of omissions, of being obliged *in solidum*, each of them for others;' therefore the father may name curators, with 'this provision and quality, that the said tutors or curators shall not be liable for omissions, but for their actual intromissions with the means and estate, *descending from the father*, and other deeds of administration thereanent; and that each of them shall only be liable for himself, and not *in solidum* for others.'

Where caution found by testamentary curators.

Testamentary curators are not obliged to find caution (*c*). But to this general rule there is an exception expressed in the statute itself. 'Declaring always, that if the condition of any of the tutors or curators to be named with the qualities above specified shall change, and become such as any near relation to the pupil or minor shall think fit to represent the same to the Lords of Session,' then the Court are empowered, 'upon the said complaint and a citation upon it, without abiding the order of the roll, to ordain the foresaid tutor and curator, upon such reasons as they shall find probable, either to find good and sufficient caution for their administration, or to remove; and if he refuse, to remove him.' The change in the condition referred to by the statute is a change to the worse in the tutor's or curator's circumstances,—or where all the tutors or curators fail but one or two,—or where the administration is conducted in a reckless, careless, and improvident manner. Each case, however, will be decided on its own circumstances, and is in the discretion of the Court (*d*).

i. 7, 11, and i. 6, 54; arg. in *Straiton* v. *Gray*, M. 16348 (1743); *Johnston* v. *Crawford*, M. 3230, Elch. *v.* Tutors 23 (1751).

(*a*) Bruce, Tutor's Guide, p. 185.

(*b*) *Johnston* v. *Crawford*, *supra*.

(*c*) Bruce 186; Bell Dict. *v.* Curatory.

(*d*) See *supra*, p. 181, as in (*b*). See these authorities as to testamentary tutors, Ersk. i. 7, 3. *Douglas* v. *Carmichael*, M. 16314 (1693); *Callender* v. *Linlithgow*, M. 16314 and 14701 (1693); *Balfours* v. *Forrester*, M. 16320 (1705).

Father's nominees preferred.

A nomination of curators by a father is preferable to an election of them by the minor. This appears from the narrative part of the statute 1696, c. 8, which declares, 'that the father can make a better choice for his children who are minors, than minors could make for themselves;' and it is enacted, in broad and general terms, without any reservation of the case where the minors had already made choice, 'that the curators named by the father, accepting before the Judge Ordinary, in the terms of their nomination, shall have right to exerce the office during all the years of their minority.' The Court have accordingly so decided. 'Found in terms of the Act 8th Parliament 1696, that a father having named curators to his son, he could not in prejudice of the father's nomination elect curators to himself' (*a*).

Who may nominate curators.

The statute allows only fathers to nominate curators (*b*). As already stated with regard to tutors, any third party, other than the father, may leave property to a minor under the condition, that the persons appointed by him shall be guardians of that particular property; or in other words, trustees (*c*). But such a nomination does not prevent the father appointing curators, properly so called, to assist the minor in the management of the rest of his property (*d*); and these would be entitled to call the trustees to account (*e*). Nor would such a nomination prevent the minor himself electing curators (*f*).

Where curators are chosen by the minor.

(3.) Long before the father was allowed to nominate curators to his children, they had been permitted to select them for themselves; and the form of appointment was regulated by express statute so early as the year 1555. It is only, however, in the absence or failure of testamentary tutors, that the minors are entitled to the privilege of electing (*g*). The nominations which will exclude his right, however, are those which are made by his father, and not by strangers (*h*).

Mode of election of curators.

The statute 1555, c. 35, first regulated the election of curators

(*a*) *Pitcairn* v. *Curators*, M. 16339 (1731). See also *dictum* of Kilkerran in *Drumore*, M. 16349 (1744). Bankt. i. 7, 67; Wal. p. 361; Ersk. i. 7, 11, *in fin.*; Brodie's note to Stair i. 6, 32; More's Notes, p. xl.; Bayne's Notes, p. 25. *Gordon's Tutors* (1710), M. 8910; *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265.

(*b*) Stair i. 6, 6; Bankt. i. 6, 9; Ersk. i. 6, 55.

(*c*) *Supra*, p. 174 *seq.*; Ersk. i. 7, 13; *Scott* v. *Kennedy*, M. 8970 and 16291, and 1 Sup. 747 (1675); *Harpers* v. *Hamilton*, M. 16262 (1633).

(*d*) *Supra*, p. 174.

(*e*) Bell's Dict. *v.* Curatory.

(*f*) See same authorities; and *Wilson* v. *Campbell*, 10 March 1819, F. C.

(*g*) *Supra*, as in (*a*).

(*h*) *Supra*, as in (*c*).

by minors. It is by judicial proceeding, which may be either before the Court of Session, or the Sheriff Court within whose jurisdiction the minor resides. If in the former, a summons is raised at the instance of the minor for choosing curators; if in the latter, a summons or edict of curatory (*a*), both containing a warrant for citing two, at the least, of the most honest and famous of the minor's kin, *i.e.* two on the father's and two on the mother's side, personally or at their dwelling-places, and all others having interest, at the market-cross of the head burgh of the shire within which his lands lie, and if he has no heritable property, at the head burgh of his own domicile, to appear in court, to hear and see curators given to the minor (*b*). The Act only requires, 'to warne twa, at the least, of the maist honest and famous of the minor's kin, and all others havand interesse, which shall be warned lawfullie.' The Court early departed so far from this enactment as to require two kinsmen on the paternal, and two on the maternal side, to be summoned (*c*). Where the whole next of kin reside beyond the jurisdiction of the Sheriff, in the case where the action is in his Court, letters of supplement from the Court of Session must be obtained to cite them, otherwise the act of curatory is null (*d*). And where the whole reside out of the kingdom, the same procedure will be adopted here as in the case where inventories are made up; namely, to present an application, which must be printed and not written (*e*), to one of the Divisions of the Court of Session (but not the Lord Ordinary) (*f*), praying the Court themselves, or to authorize the Judge Ordinary, to dispense with the citation of the kin disqualified; and upon curators being chosen, to

(*a*) A curator *ad negotia* will not be given summarily, but only in terms of the provisions of the statute.—*A.* v. *B.* (1577), M. 16233.

(*b*) See the statute, and Fraser, Jud. Proceedings, 172; 3 Jurid. Styles, p. 270; 3 Bell's Styles, 254 and 270; Dallas' Styles, Part iii. p. 99.

(*c*) *Wallace* v. *Kennedy*, M. 16290 (1674); Ersk. i. 7, 11.

(*d*) 2 Jurid. Styles, p. 517, note; new ed. p. 658, note. *Burnet* v. *Burnet*, M. 16306 (1685).

(*e*) *Duthie*, 6 Dec. 1854, 17 D. 143.

(*f*) *De Maria* v. *De Maria*, 25 June 1831, 3 Jur. 536. This is not affected by the statute 20 and 21 Vict. c. 56, authorizing the presenting of summary petitions to the Junior Lord Ordinary, (1) because these petitions are usually incidental to dependent causes, and (2) because they are not comprehended in any of the special classes of petitions enumerated in the statute. See *Kyle*, 15 June 1861, 23 D. 1104; and for the practice in regard to similar petitions in the making up of tutorial and curatorial inventories, *Countess of Morton*,

authorize the next of kin on the qualified side only, or the delegate of the judge, to concur with them in making up inventories (*a*). But if there be kin in this country, though not the nearest, they may be cited though there be nearer abroad (*b*). Where the children are bastards, they have no next of kin, legally speaking; but, *ad hunc effectum*, the Court have held the relations on the mother's side to be so, and that *inventories* must be made up at their instance (*c*). On the same grounds, the Court would authorize a citation of the next of kin on the mother's side as sufficient in the election of curators (*d*); and if there were no next of kin on the mother's side resident in Scotland, they would authorize the Judge Ordinary to proceed with the edict for the election of curators without the citation of any of the next of kin (*e*). Instead of this, it is not unusual to apply to the Court by summary petition to appoint a curator or curators, whom they will authorize to give up judicial inventories; and they will ordain the judge receiving them to interpose his authority thereto, to dispense with the citation of any next of kin, and to receive the proper and usual caution (*f*). Legitimate children may have no relations in point of fact on the father's or mother's side, as bastards have none in point of law. In these circumstances, the course to be followed is, to present a petition to the Court, praying that the citation of those on one side shall be held sufficient.

In one case, where the minor had no next of kin on the mother's side, who had been a bastard, and the next of kin on the father's side were resident in England, she executed a deed of nomination in favour of a party as curator, and then presented a petition to the Court to confirm and approve of the

11 Jan. 1859, 21 D. 216; *Wilson* v. *Alexander*, 15 March 1859, 21 D. 736.

(*a*) See App.; see also *supra*, p. 197. *Hobbs* or *Lamont*, 29 June 1831, 9 S. 841; *Shields and Others*, 2 Feb. 1832, 10 S. 282; *Blantyre*, 14 June 1832, 4 Jur. 500, and 10 S. 702; *Fordyce and Others*, 23 June 1836, 14 S. 992; *Bannerman*, petrs., 27 Jan. 1838, Jur.; *Thomson*, 18 Jan. 1833, 5 Jur. 180; *Steel*, 25 Nov. 1847, 20 Jur. 40; *Duncan*, 23 May 1848, 20 Jur. 371; *Bethune*, 19 July 1851, 14 D. 12; *Mather*, petr., 22 June 1853, 25 Jur. 460.

(*b*) See terms of statute.

(*c*) *Supra*, p. 199 (*b*).

(*d*) *A.B.*, 23 June 1838, 16 S. 1209, and 13 F. C. 823.

(*e*) *Kyle*, 15 June 1861, 23 D. 1104. In this case the Court ordered written argument.

(*f*) *Young*, petr., 19 Feb. 1818, F.C.; *Wood*, 31 May 1834, 12 S. 663; *Reid*, petrs., 10 July 1839, 11 Jur. 603, and 1 D. 1217; also p. 357, as in (*b*).

nomination, and to interpone authority thereto. The Court held such an application to be quite incompetent, and the Lord President observed: 'The proper course is to raise an action for choosing curators, and then to apply to the Court to dispense with citation of the next of kin. We cannot grant this application, and would therefore recommend that it be withdrawn' (*a*). In special cases the Court have sometimes appointed a *curator bonis*, but such judicial appointments are generally made only when the party cannot elect curators himself, such as a pupil or a lunatic; but the Court have in various instances nominated curators to minors, on the ground of want of next of kin on either the father's or mother's side, who might be cited to the election (*b*).

Proceedings in Court in choosing of curators.

On the expiry of the *induciæ* (which are nine days before the Sheriff Court, and fourteen before the Court of Session), the edict or summons is called. If there be no objection stated to the proceeding, the minor may appear in court personally. There, in presence of the judge, he declares that he is past pupillarity, and makes choice of certain parties to be his curators, whom he declares not liable in omissions nor *singuli in solidum;* and he signs a minute to that effect. These exemptions from liability for omissions, and limitation of responsibility, are mere words of style, meaning and effecting nothing, as it is settled law that no minor can grant such privileges (*c*). On the authority of the judgments by which this point has been determined, it is laid down that all the other privileges sometimes given by minors at the election of curators, and whose object is the restriction of the rules of common law in favour of the curators, are *ultra vires* of the minor, and null (*d*). Before the minor can appoint curators he must have attained the full age of puberty; and if the act of curatory be made in his pupillarity, however near the period of its expiry, it is absolutely void (*e*). And although curators so appointed continue

(*a*) *Mather*, 22 June 1853, Jur.

(*b*) *Davidson* or *Johnstone*, petrs., 15 June 1839, 11 Jur. 529, and 1 D. 1030; *Roberts*, 11 July 1839, 14 F. C. note, p. 1059; *Watson*, 6 Feb. 1827. See *infra*, Part iv. chap. ii. I., where the authorities are collected.

(*c*) *Watson* v. *Rae*, M. 16369 (1773); *Mathie* v. *Watson*, 5 Sup. 631, Hailes 691 (1775); *Rankine* v. *Johnstone*, M. 16327 (1710). Ersk. i. 7, 27. Stair's doctrine, therefore, that the minor 'may adject any condition he thinks fit in their election,' must be so far limited (Stair i. 6, 30). But see More's Notes, p. xl.

(*d*) Bell's Dict. *v.* Curatory, p. 244.

(*e*) *Tours* v. *Tours*, M. 16231 (1566);

to act after pupillarity, without any objection being stated by the minor, yet it is said their right to the office would not be sustained upon the ground of homologation (*a*). The minor is entitled to regulate the form of appointment, by making the nomination simple or joint; with a *sine quo non* or a quorum; conditionally or the reverse (*b*).

Acceptance and oath.

The curators named, if present, accept the office by signing a minute to that effect. They have then administered to them the oath *de fideli administratione officii*, which they also subscribe along with the judge (*c*). The act of curatory is not null, though the oath be not administered (*d*); but the curator's written acceptance has been considered so necessary, that the Court have annulled an act of curatory for want of it (*e*). It would rather seem now that acceptance of the office of curatory may be *rebus ipsis et factis;* and that if a curator has entered on the duties of the office by unequivocal acts, a written acceptance would not be required. In the same case, it was also held that a minute of acceptance of the office, subscribed by initials, was not conclusive as to the acceptance, where the curators had subsequently drawn back and refrained from acting (*f*).

Should the minor or curators not appear (which is commonly the case), a procurator appears for the minor, with a deed of nomination of the curators, which he lodges with a minute (*g*); and a commission is granted for taking their written acceptance and their oaths (*h*). In one case, the curator being abroad, another party proposed to take the oath for him, as was common in other countries; but the Court would not sanction the practice, and

Pearson v. *Walwood*, M. 16301 (1681); *Ramsay* v. *Hay*, M. 16245, and 1 Sup. 20 (1624); *Campbell* v. *Chalmers*, M. 16263 (1634); *Gorthie* v. *Methven*, M. 16224 (1553). Balf. p. 121, c. 1; Craig ii. 20, 8; Bankt. i. 7, 65; Ersk. i. 7, 11.

(*a*) Bankt. i. 7, 65. *Pearson* v. *Walwood*, *supra*.

(*b*) Stair i. 6, 30; Bruce, p. 187; Bankt. i. 7, 49; M'Ken. i. 7, 7; and see the interlocutor of the Court in *Young*, petr., 19 Feb. 1818, F. C.

(*c*) Balf. p. 122, c. 4; Craig ii. 20, 8; Stair i. 6, 30; 2 Jurid. Styles 517, 518, new ed. p. 659.

(*d*) *Airth* v. *Laird*, M. 14692 and 8938 (1602); *Paterson* v. *Wishart*, M. 16241 (1613).

(*e*) *Sibbald* v. *Hay*, M. 16246 (1626). Stair i. 6, 30; Bruce, p. 188. *Maxwell* v. *Maxwell*, 4 Sup. 491 (1700); *M'Briar* v. *Maitland*, 4 Sup. 828 (1711).

(*f*) See *dicta* in *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265, particularly note of Lord Curriehill (Ordinary).

(*g*) Stair i. 6, 30; 2 Jur. Styles 291. *Hamilton* v. *Curators*, M. 16245 (1625).

(*h*) *Dalhousie*, 4 Sup. 405 (1698).

ordained the oath to be taken by commission (*a*). The next step is for the curators to find caution (*b*). When there are a number of curators, it seems to have been not unusual for them to be taken as cautioners for each other (*c*), though they are so at common law, as being liable *singuli in solidum*. The Court have, however, recently held, that such a proceeding is objectionable, and have refused to sanction the arrangement (*d*). 'The case cited occurred three hundred years ago, and there has been no case in point since that time. It would be dangerous to rely on a precedent of such antiquity, which does not appear to have been blended into our practice. If the parties are so respectable as the petitioner states, they can have no difficulty in finding a cautioner' (*e*). 'A cautioner and a co-obligant, in such a case as this, are not in the same position. The cautioner is a mere watchman, who can have no interest to go wrong; but the co-curators may have the same interest to do so. There are perhaps circumstances in this case favourable to the application, but that is not of the smallest importance. The most favourable circumstances possible will not authorize us to adopt a new general rule' (*f*).

Making up inventories.

Along with the proceeding above detailed, of nominating the curators, there is always conjoined the making up of the curatorial inventories (*g*), and the edict or summons is framed so as to embrace both objects (*h*). After the parties are decerned to be curators, the procurator of the minor craves, by a minute, that a delegate be appointed by the Court, in absence of the nearest of kin (when such is the case), to concur with the curators in making up inventories of the minor's means, which is accordingly done. The extract of the act of curatory will not be given out till the inventory is made (*i*).

Act of curatory.

An act is then extracted, called the Act of Curatory, which con-

(*a*) *Dalhousie*, 4 Sup. 405 (1698).

(*b*) Craig ii. 20, 8; Stair i. 6, 30. Terms of Statute 1555, c. 35. Under the old law also they required to find caution. *Balfour* v. *her Daughters* (1550), M. 16222; *Boswell* v. *Logane* (1522), M. 16215.

(*c*) Balf. p. 122, No. 105. *Lillie* v. *Foret*, M. 16226 (1558); *M'Briar* v. *Maitland*, 1711, 4 Sup. 828.

(*d*) *Grant*, petr., 26 May 1848, 10 D. 1052.

(*e*) *Per* Lord President (Boyle), *ibid.*

(*f*) *Per* Lord Mackenzie, *ibid.*

(*g*) See *infra*, p. 362.

(*h*) See Appendix.

(*i*) *Wallace* v. *Kennedy*, M. 16290 (1674).

tains the inventory thus made up, with the whole procedure had in the matter; and this is the curator's authority for exercising the office (*a*).

Minor has no second choice of curators.

After curators have once been chosen, they are entitled to the office till the minor have attained majority, or till they be removed by sentence of a judge, or fail in any other mode. So long as they are unremoved, the minor can have no second choice (*b*); but should they die, or in consequence of their misconduct be removed by sentence of a judge, the minor is entitled to choose curators of new, according to the same order as at the first. 'Quhilkis (*i.e.* curators) beand given in maner foresaide, they sall not be revoked nor discharged, nor uthers chosen to the minor, unto the time they be called before the Lordes of Councel, or uthers judges ordinar, at the will of the bairne to heare and see them discharged, and revoked for reasonable causes; quhilkis being foundin of veritie, they then to be discharged, and uthers curatoures given in their places be the ordour foresaid, with caution, and na utherwise' (*c*).

Sequestration of minor previous to election.

It is clear that a girl at twelve, or a boy at fourteen, may be often extremely unfit for making a proper and judicious selection of curators. Along with immaturity of judgment and want of experience, they are often subjected to the pernicious influence of interested parties, who have an object to serve in the election of their curators. To avoid this latter evil, and to enable the minor to arrive at a decision after the best consideration, the Court will, on application made to them, and on cause for their interference being shown, sequestrate the person of the minor, for some time previous to his electing curators, taking care that during that period he is kept free from suspected and pernicious influence (*d*). If a process for choosing curators has been already raised, the Court will have more hesitation in interfering, and will

(*a*) See App., 2 Jur. Styles 518, new ed. 659; Frazer's Jud. Proceedings 172; and Bell's Forms iii. 270 *seq.*, where the whole procedure is minutely described.

(*b*) Words of the Act 1555, c. 35. *A.* v. *B.*, M. 16221 (1545); *Adam* v. *Fairholm*, M. 16247 (1627).

(*c*) 1555, c. 35. *Heriot* v. *Libberton and Thomson* (1564), M. 16229. See also *Scotstarvet* v. *Buccleugh* (1642), M. 16266.

(*d*) *Bower*, complainer, M. 8910 (1750); *Bargany* v. *Hamilton*, M. 16319 (1702); *Wilson* v. *Campbell*, 10 March 1819, F. C. See *Gordon's Tutors* (1710), M. 8910. See for analogous procedure, where the question related to the custody of minor children, *Harvey* v. *Harvey*, 15 June 1860, 22 D. 1207, opinion of the Lord Justice-Clerk.

in no case do so without some evidence of undue influence being used or anticipated (*a*).

Curators appointed by the Court.

(4.) In actions at the instance of a minor or against him, the Court will appoint a curator *ad litem*, should he have no guardian otherwise to assist him (*b*). But in former times, judicial appointments of curators were made of a more permanent description. Where a tutor had become incapacitated, or was absent from the country, or was negligent in the discharge of the duties of his office, the Court were in the practice of appointing a curator along with him, to control his management, and to look after the pupil's affairs (*c*). There has been no instance of such an appointment in the modern reports; and the course which would in all probability be followed, would be at once to remove the tutor, and appoint a permanent *curator bonis* (*d*). The course followed in one case, where one of two trustees had gone abroad, was to appoint a judicial factor on the trust estate, the Court intimating that if either the absent trustee returned to this country, or if he died, and so left but the one surviving, the appointment of the factor would be recalled, and the trust management revived (*e*).

Acceptance of the office.

III. It is free to curators of all kinds to accept or decline office (*f*). Testamentary curators declare their acceptance in the same manner as testamentary tutors, that is, expressly or tacitly (*g*). It may here be remarked, that the Act 1696, c. 8, seems to contemplate, that such curators shall declare, before the Judge Ordinary, their acceptance of the office; a proceeding not essential (*h*), and seldom adopted in practice. With regard to curators chosen by the minor himself, the statute 1555, c. 35, has appointed no particular mode in which they are to declare their acceptance (*i*). It has been

(*a*) *Grant* v. *Innes*, 14 Dec. 1844, 7 D. 226.

(*b*) See *supra*, p. 156. The effect of the refusal of a curator *ad litem* to give his concurrence in an action is at present *sub judice*. See Appendix.

(*c*) Ersk. i. 7, 29, *in fin.*; Bruce's Tutor's Guide, p. 184. *M'Brae* v. *M'Laine*, M. 16278 (1667); *A.* v. *B.*, M. 16219 (1534); *M'Brair* (1667), M. 16279.

(*d*) *Supra*, p. 313.

(*e*) *Smith* v. *Smith*, 20 March 1862, 24 D. 838; *Dewar*, 8 Dec. 1853, 16 D. 163.

(*f*) Stair i. 6, 30; Bankt. i. 7, 49; Ersk. i. 7, 20.

(*g*) *Supra*, p. 193 *seq.*; Stair i. 6, 6; Ersk. i. 7, 20.

(*h*) See, however, the conflicting opinions of Lord Curriehill and Lord Ivory in *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265.

(*i*) *Supra*, p. 357, where the forms of acceptance are stated.

recently held, that testamentary curators, who had subscribed by initials a minute of acceptance, but who had not acted as such for a period of more than eight years, were not to be considered as having accepted office in terms of the statute 1696, so as to render their consent essential to the validity of a deed executed by a minor to whom they had been nominated curators (*a*). After the curators have accepted the office, but the whole of them have not complied with the formalities requisite to enable them to obtain a valid title in law, the rule would seem to be, that if a majority had done so, their authority will be sufficient to validate the minor's acts (*b*). This only applies to those cases where a majority can act. If the nomination were joint, or with a quorum, or a *sine quo non*, all the curators must qualify themselves, in terms of law, to render the nomination effectual to any purpose (*c*).

Making up inventories.

IV. Curators are, in like manner as tutors, bound to make up inventories of the minor's means and estate, prior to their entering upon the duties of their office (*d*). The mode of doing so, and the penalties for omitting to do it, are the same as have been already detailed relative to tutors (*e*). If the father have appointed the same parties to be both tutors and curators, or if the minor shall appoint his tutors to be also his curators, there seems to be no express authority as to whether such curators are bound to make up a new inventory. There is also an equal paucity of express authority as to whether or not curators who were not tutors are bound to make up new inventories after tutors have once done so. In the first case, where those who were tutors continue curators, it would seem not necessary for the curators to make new inventories (*f*). But in the second case, where the curators are different from the tutors, it has been said that new inventories must be made up (*g*). But what shall be said as to the case where only *some* of the curators were formerly tutors? Curators of all kinds, with the exception of fathers (*h*), and the husbands of minor wives (*i*), are bound to make up inventories.

(*a*) *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265.
(*b*) *Airth* v. *Laird*, M. 8938 (1602).
(*c*) *Supra*, pp. 176 *seq.* and 210 *seq.*
(*d*) Act 1672, c. 2; last clause of Act 1696, c. 8; Ersk. i. 7, 21.
(*e*) *Supra*, p. 197 *seq.*
(*f*) Wall. 363.
(*g*) Wall. 363.
(*h*) *Supra*, p. 203.
(*i*) *A.* v. *B.*, M. 8929 (1724).

CHAPTER III.

POWERS AND DUTIES OF CURATORS.

THE duties of a curator and those of a tutor are totally different. Those of the curator consist in giving the minor counsel and advice, and consenting to his acts; while those of the tutor consist in acting for the pupil. The difference arises from this, that in the one case the minor has a capacity to act for himself, while a pupil has in law no person. The minor is the principal agent in all his affairs, his curators being mere counsellors or advisers; while, on the other hand, it is the tutor alone who acts in regard to the business of a pupil. Hence the maxim, *Tutor datur personæ, curator rei* (*a*). The powers and duties of all curators are alike. Fathers, testamentary curators, and those elected by the minor himself, possess the same authority; with this explanation, that the powers of the two latter classes may be modified according to the deed or act of nomination (*b*).

Curator's powers as to the minor's person.

I. When a child arrives at puberty, he is by the law of Scotland entirely free to dispose of his person, independently of any guardians, natural or civil (*c*). He may marry, or fix his domicile, or alter it, as he may please; and no guardian and no court of law can restrain him from going abroad or staying in this country, however beneficial may be the opposite course from that he proposes to follow (*d*). A girl, in one case, who was only twelve years

(*a*) *Supra*, p. 143; Stair i. 6, 35; Bankt. i. 7, 48; Ersk. i. 7, 14. *M'Intosh* v. *Fraser*, M. 11239 and 16290 (1675); *Bute* v. *Campbell*, M. 16338 (1725). More's Notes, p. xli.

(*b*) Stair i. 6, 35, *in fin.*; Ersk. i. 7, 15. *Foster* v. *Foster*, M. 16238 (1610). This was the case of a father who was held to have no higher authority than an ordinary curator.

(*c*) Fraser, Pers. and Dom. Rel. vol. i. p. 27.

(*d*) Balfour, p. 337, c. 8, and p. 121; Ersk. i. 7, 14; Bankt. i. 7, 48.

and five days old, and therefore a *minor pubes*, was put by her guardians at a boarding-school in Edinburgh. Her mother having married a second time, a gentleman in Lisbon, the daughter addressed a letter to her guardians, informing them of her resolution to accompany her mother, and not to go to the boarding-school; adding that, by law, she was now become mistress of her own person. A majority of the guardians, alarmed at this message, presented a bill of suspension to the Court, praying for an interdict against the daughter's going abroad, and against her mother and every other person carrying her out of the jurisdiction of the Court. The case was argued in written pleadings, and the Court refused the interdict. It was observed on the bench, that 'the law of Scotland has not conferred on curators that controlling power over the persons of minors which is here claimed; and the *nobile officium* of the Court ought never to be at variance with the law' (*a*).

Education.

It is the duty of curators to advise the minor as to the course of education proper for him. This is a duty, however, which can never ascend higher than advice. The curator cannot enforce it by the compulsitors possessed by a court of law, as may be done in England, where the Lord Chancellor may send an officer to keep the minor at the school appointed by his guardian (*b*). The case of *Graham* proves how nugatory may be the best advice of the curators; and there are other cases to the same effect (*c*). The only mode in which the minor can be controlled is, indirectly, through the medium of his property. He cannot appropriate to himself what part of it he pleases for his aliment and maintenance; and as for this purpose he requires the consent of the curators, the latter may refuse, unless the minor show that it is to be properly expended. There is no authority, however, for saying that the curator could make it a condition precedent of his consent, that the minor should go to any particular school pointed out by him,

Scott v. *Kennedy*, M. 8970, 1 Sup. 747 (1675); *Marshall* v. *M'Douall*, M. 8930 (1741); *Anstruther* v. *Murray*, 4 Sup. 159 (1694); *Anonymous*, 1 Sup. 554 (1675); *Kincaid* v. *Johnstone*, M. 16228 (1561); *Newton* v. *Kerr*, M. 16218 (1533). Robertson on Pers. Suc. p. 201, and case there quoted.

(*a*) *Graham* v. *Graham*, M. 8934, and Hailes 860, and 5 Sup. 635 (1780). See also the observations of the Lord Justice-Clerk in *Harvey* v. *Harvey*, *supra*, p. 360.

(*b*) Chambers on Infancy, p. 116.

(*c*) *Marshall* v. *M'Douall*, M. 8930 (1741).

or be regulated by his directions. All that he can insist for, is evidence that the money will not be uselessly squandered.

Duty of the curator in providing a profession for the minor.

Another duty of a curator is to get the minor placed out to some profession or trade; but here his power also must be restricted to advice. He cannot compel the ward to take the profession he thinks best. But if placed out to some suitable employment, the curator will be justified in allowing his means to be invested in such a manner as to form a stock-in-trade (*a*).

Curator's power over the estate.

II. A curator by himself has no positive power to do any act whatever relative to the minor's estate, though it has been stated otherwise by Erskine. Thus it has been said, that 'the powers which are by our law or usage conferred on tutors and *curators*, are for the greatest part included in the notion of administration. They can sue for, receive, and grant acquittances, etc.; they may use all diligence competent by law,' etc. (*b*). This is true as regards tutors, but it is not so as to curators; for they cannot exercise any of the powers here stated of themselves. 'Curators,' says Lord Stair more correctly, 'cannot discharge for their minors, but only consent to their minors' discharge' (*c*); and his Lordship again states the same doctrine thus: 'After pupillarity, a father is no more tutor to his children, and so might not discharge for his daughter, being past pupillarity, but only consent with her as curator' (*d*). This is the law as stated by all the writers on the law of tutory, and even by Erskine himself, in another place: 'After he has attained the age of puberty, it is properly himself who acts: the curator does nothing more than concur with him, or consent to his deeds; and consequently a deed signed by the curator only, without the minor, is as truly void as one subscribed by the minor only, without his curator' (*e*). Notwithstanding this clear explanation of the duties of minor and curator, we find Erskine writing as follows: 'A minor having curators is entitled to examine the state of his own affairs, and to judge of the rationality or expediency of deeds proposed to be done by the curators, with his concurrence' (*f*). All the cases are in direct contradiction to this

(*a*) *Duncanson* v. *Duncanson*, M. 8928 (1715); Ersk. i. 7, 24.
(*b*) Ersk. i. 7, 16.
(*c*) Stair i. 6, 35.
(*d*) Stair i. 5, 12, and i. 6, 35, *in fin.*
(*e*) Ersk. i. 7, 14; and see Ersk. Prin. i. 7, 8.
(*f*) Ersk. i. 7, 33.

doctrine, as they undoubtedly establish that it is the *minor* who *does*, with concurrence of the curator. The consent of the curator to the minor's deed may be given at any time, even *ex intervallo* (*a*). But it is doubtful if it could be adhibited after the minor's death (*b*).

Act of curator alone is null.

As a consequence of these principles, any act of the curator alone is absolutely null. Several of the cases bring this out very clearly. In an early case, where the curators of a minor pressed her to sign a factory, which she refused to do, they applied to the Court for authority to act without the minor's consent; but this was unanimously refused, as *ultra vires* of the Court (*c*). Again: 'A discharge granted by a curator, without concurrence of the minor, was found not to give liberation to the debtor, it being pleaded that the deeds of a curator, without consent of his minor, are equally void as deeds of a minor, without consent of his curator' (*d*). The same decision was pronounced in another case, where it was found that curators could not uplift rents without the minor, and that their discharge was ineffectual to the tenants (*e*). Another illustration of the doctrine is found in a modern case. It was an extremely beneficial thing for the minor, the proprietor of lands, to remove his mother from a farm, and let it at a high rent. Accordingly, the minor gave his consent to the exposure of the subjects, as to be let; but as soon as a process of removing was brought against the mother, the minor disclaimed it; and the Court found that the action could not proceed (*f*). In another case, a vote in the election of a minister was rejected, being signed on the mandate of the curator alone, and not of the minor, with the consent of the curator (*g*). Bills, however, which were granted by curators alone, in the ordinary administration of the estate, although without the knowledge or concurrence of the minor, have been sustained as valid items of discharge in an accounting with

(*a*) *Learmonth* v. *Leslie*, M. 16235 (1586).

(*b*) See a case as to husband and wife, *Bullions* v. *Bayne*, M. 6149 (1793), stated, Fraser, Pers. and Dom. Rel. vol. i. pp. 423–4.

(*c*) *Drummore* v. *Murray* (1744), M. 8930.

(*d*) *Bute* v. *Campbell*, M. 16338 (1725). See also *Foster* v. *Foster*, M. 16238 (1610).

(*e*) *M'Intosh* v. *Fraser*, M. 11239 (1675).

(*f*) *Allan* v. *Walker*, Hume, p. 586 (1812).

(*g*) *Stirling* v. *Campbell*, 4 March 1813, aff. 1 July 1816, 6 Paton App. 238.

the minor, but only on proof of the proceeds having been *in rem versum* (*a*).

Curators cannot alienate estate.

If such be the rule as to mere acts of administration and management, such as uplifting rents, it will *a fortiori* hold with regard to those more important transactions, where an alienation is made of the minor's estate, or a permanent burden imposed upon it. The general doctrine is thus laid down in a case reported by Monboddo: 'Lord Elchies said that a tutor acted for his pupil; the curator of a furious person likewise for him; but an interdicted person acted himself with consent of his interdictors; and, in the same manner, a minor with consent of his curators, whom he might want altogether, unless when his father named for him; and when he had them, was only obliged to advise with them. And this seemed to be the opinion of the bench' (*b*). In another case, the Court of Session held leases to be null, because granted by a father without concurrence of his minor son, the proprietor of the estate; and this decision was affirmed on appeal (*c*). Consents by guardians, under the Entail Amendment Acts, are in terms of the statute 'in all respects as effectual as if the same had been given by such heir himself when of full age, and of legal capacity to act in his own affairs' (*d*). The effect of this clause, in regard to the case of a minor, came under the consideration of the Court in a petition for authority to excamb part of an entailed estate. One of the heirs whose consent was required was a minor *proximus majorennitatis*, and a curator *ad litem* having been appointed to him in terms of the statute, a consent signed by the curator alone was lodged in process. The Court, after consulting the other judges, found 'that the present application cannot proceed further without evidence of its having been communicated to A. B., who is a minor;' and there-

(*a*) *Stark* v. *Tennant*, 11 Feb. 1843, 5 D. 542; and 2 July 1846, 8 D. 1001.

(*b*) *Murray* v. *Murray*, 5 Sup. 737 (1744). Mr William Bell says, that 'although curators cannot by themselves grant discharges for money which has been invested on behalf of the minor, it rather appears that they may of themselves receive the interest; and further, when the money is uplifted, they are entrusted with the disposal and reinvestment of it. In like manner, they are entitled to uplift rents falling due from the minor's estate, and even to grant leases' (Bell's Dict. *v.* Curatory). The authorities quoted in the text show that this doctrine is erroneous.

(*c*) *Pentland* v. *Murray and Others*, 15 Feb. 1831, 5 W. S. 28.

(*d*) 11 and 12 Vict. c. 36, s. 31.

fore sisted further procedure (*a*). The subsequent Entail Amendment Act, passed in August 1853, however, enacts that 'every consent which, on behalf of any heir of entail being under age or subject to any legal incapacity, whose consent has been, or is, or shall be required under the said recited Act, has been or shall be given by any tutor or curator, or other legal guardian duly authorized to consent, in terms of the said recited Act, on the behalf of such heir of entail, shall be deemed and taken to be, and shall be valid and sufficient, except in any case of application for disentailing, without the concurrence of such heir of entail, and without any consent to or approval of the actings of such tutor or curator or other legal guardian by such heir of entail; but the consent of such curator or other guardian on behalf of such heir of entail, shall not, etc. (unless in any case in the circumstances of which the Court shall be of opinion that the consent of the tutor, curator, or other legal guardian alone is sufficient) be received or acted on where such heir of entail, being of sound mind and above the age of fourteen years, shall, in the course of the application wherein such consent may be tendered, enter appearance and oppose the reception of such consent, which such heir is hereby authorized to do' (*b*). Under the express terms of this enactment, it would appear that, with the exception of consents to disentail, which are apparently left to the common law rules, the consents under the Entail Acts are valid, though subscribed only by the curator, unless the minor should appear to oppose the reception of such consent. It is, however, the duty of the curators appointed, in petitions for disentail, to communicate with the minors, and advise with them as to the propriety of giving or withholding the consent required (*c*).

Possession by curator is possession by minor.

Under the old law, when possession or confirmation was necessary to vest moveable succession, it was found that the possession of a curator was the same as that of the minor himself. A distinction was attempted to be drawn between the possession of a tutor and that of a curator. It was argued that the pupil is not entitled to act for himself, and in law has no person. A minor is in a different situation. In law he can act, he can be obliged, he can

(*a*) *Wharncliffe*, petr., 15 Feb. 1853, 15 D. 387.

(*b*) 16 and 17 Vict. c. 94, s. 18.

(*c*) *Duff*, petr., 9 June 1854, 16 D. 917.

possess, and his curators do no more than concur with him. The act of the curator, without the consent of the minor, therefore, is null. The possession of the curator, therefore, cannot be held to be the possession of the minor, unless it can be shown that it flowed from, and was authorized by him. But the Court held that this in such a case is to be presumed, and accordingly found the possession of the curator to be that of the minor, and that no distinction was here to be made between tutors and curators (*a*). It has also been found that a curator may recover a ward's title-deeds without concurrence of the minor (*b*). In a suspension on juratory caution, where one of the suspenders was a minor and abroad, the Court, of consent of the respondent, remitted to take the oath of one of his curators and the other suspender (*c*).

Where minor refuses to act with the curator.

The principles above stated solve an important practical question, which may occur in all curatorial administrations. Like a tutor, a curator is liable in a severe and rigid diligence, but, unlike the tutor, he has not the same powers of management. If the minor refuse to act, loss may ensue, for which the curators might be afterwards involved in liabilities, or at least put to trouble and expense in freeing themselves. At one time it was thought that the Court could compel the minor to concur with his curators, or at least would themselves authorize the act which he refused to perform. Elchies reports a case thus: 'Whether, in any case, a court of equity can interpose where a minor refuses to concur with his curators in acts of administration that they think reasonable, was doubted. The President thought, in some cases they might.' But as the Court, in the case referred to, did not think the minor's refusal to concur unreasonable, they refused to compel her, or to authorize the curator to perform the act without the minor. Kilkerran says, that 'it was the general opinion, that there was no authority in the Court to compel a minor to act with his curators, more than to compel a major to act with his interdictors; that as the Court could not compel a minor to choose curators, so it could not authorize them to act without the minor. And though

(*a*) *Jamieson* v. *Spottiswoode's Trs.*, 6 Dec. 1808, F. C.

(*b*) *M'Kirdy* v. *M'Lachlan*, 26 May 1840, stated *infra*, pp. 378-9.

(*c*) *Andrew* v. *Colquhoun*, 2 Dec. 1852, 15 D. 164.

the consequence of this should be to elude the Act 1696, there was no help for that; nor was that Act of Parliament ever so understood, that the father could force the minor to submit to his nomination, though at the same time, it is true, that where the father has nominated, the minor cannot choose others' (*a*). Accordingly, in such perplexing circumstances, where the obstinacy of the minor may be productive of his own ruin, the Court would have no other remedy to apply but to free the curators from the office, which they would do on an application for that purpose (*b*). But, seeing that a minor of such a disposition would most probably precipitate himself into foolish and ruinous courses, the Court, before removing the curators, and thereby leaving the minor at liberty, will take precautions for his security. Thus, an application was made by Andrew Brown, praying to be relieved of his office of curatory, on account of infirmity, as well as by reason of some difficulties which existed between him and the minor. His application was complied with, upon condition of the minor's consenting to make a new nomination of curators (*c*). This is in accordance with the Act 1555, c. 35, which allows the Court to free curators from the office upon 'reasonable causes; which being found of verity, they then to be discharged, and other curators given in their places by the order foresaid, with caution, and no otherwise.'

Where curators unreasonably refuse their consent.

On the other hand, if the curators should unreasonably refuse to give their consent to a necessary act of administration, it is thought, according to modern principles, that the Court would remove them from office (*d*).

Curators bound to get the minor to do necessary acts.

Though a curator is more a counsellor and adviser than an actor, yet he is so far of the latter character, that he is obliged to insist on the minor doing what is right and proper in the management of his affairs, otherwise he must resign the office with the consent of the Court. 'Their duty is to see to the minor's affairs that they get no detriment; and so they must answer not only for

(*a*) *Murray's Curators* v. *Murray*, Elch. *v.* Minor 10, 5 Sup. 737 (1744); and same case, *Drumore and Others*, petrs., M. 16349 and 8930.

(*b*) Bankt. i. 7, 49, and i. 7, 55; Erak. i. 7, 29; *Scotstarvet* v. *Buccleugh*, M. 16266 (1642).

(*c*) *Andrew Brown*, petr., 4 June 1818, not reported; *Scotstarvet* v. *Buccleugh*, *supra*.

(*d*) See *supra*, *v.* Suspect Tutors, p. 312 *seq.* See *Creditors of Nisbet*, Elch. *v.* Minor 3 (1736).

the deeds whereunto they consent, but for their omission, and for any detriment the minor suffereth by their negligence.' 'And therefore they must not only be counsellors to the minors, showing them what they ought to do, and requiring them to do the same; but, especially, they must *cause* them constitute factors, and grant procuratories for pursuing their actions and putting them to execution, and for uplifting their money, whether it be the stock (of that which may be in hazard), or annualrents or rents. For seeing they must be accountable, they must not suffer the minor to have his own goods and money in his own hand, lest he lose or misspend them' (*a*). In this way, though the curator cannot, like the tutor, do the thing necessary himself, yet he is responsible that the thing shall be done.

General duties of curators.

It is the duty, and within the power, of the curator, immediately upon entering on office, to complete the minor's titles (*b*); to insist on his collecting his debts, rents, and interests outstanding, or money lent, when not sufficiently secured in the hands of responsible debtors (*c*). He ought also to advise the minor to institute actions and diligence for the recovery of debts, in like manner as tutors (*d*); to sell off moveable subjects that are of a perishable nature (*e*); to keep the property in repair (*f*); to invest the money, according to the mode already explained, so that it may not be misspent (*g*), to pay off just debts owing by the minor. The whole of these rules have been fully illustrated in stating the law as to the cognate duties of tutors.

Curator *auctor in rem suam.*

III. On the same grounds on which the rule has been adopted as to tutor and pupil, it is the law of this country, that no curator can be *auctor in rem suam* (*h*). The mode in which this rule is applied in practice has been already explained (*i*). A deed of this kind, to which the consent of both minor and curator is given, is considered to be the deed of the minor alone, without the concurrence

(*a*) Stair i. 6, 36.

(*b*) Ersk. i. 7, 24; Bell, Dict. *v.* Curatory.

(*c*) Stair i. 6, 36; Ersk. i. 7, 24.

(*d*) Ersk. i. 7, 16; Stair i. 6, 36; *supra*, p. 229.

(*e*) Ersk. i. 7, 17, and i. 7, 24.

(*f*) Ersk. i. 7, 24.

(*g*) *Supra*, p. 235; Stair i. 6, 36.

(*h*) Bankt. i. 7, 57; Ersk. i. 7, 19. *M'Kenzie* v. *Fairholm*, M. 8959 (1666); *Carstairs* v. *Moncrieff*, M. 8962 (1672). The rubric of this case erroneously says, that the minor had tutors instead of curators.

(*i*) *Supra*, p. 279 *seq.*

of his curator, for no such concurrence can be given; and it is therefore null (*a*).

There are several cases in which a minor may confer benefits on a curator without the deeds being struck at by this rule. The whole moveables of the minor may be bequeathed to the curator (*b*). It is, however, doubtful whether, on any ground, curators can enter into contracts with the minors. A bill of suspension was passed to try the question, whether a *bona fide* lease by the minor to the curator was valid (*c*)? The institutional writers hold it to be null (*d*). There is one kind of curatory to which this maxim is inapplicable—that of husband and his minor wife (*e*).

Liabilities of curators and diligence prestable by them.

IV. The diligence prestable by curators is the same as that by tutors (*f*). 1. Fathers, in their character of administrators for minor children, are not liable except for *culpa lata* (*g*). 2. Testamentary curators are liable only for *culpa levis in concreto*, that is, for such diligence as they employ in their own affairs (*h*). 3. But it would appear, on the other hand, that curators elected by the minor himself are liable for *culpa levis in abstracto*, that is, for such diligence as a prudent man employs in his own affairs. They seem to stand in the same situation as tutors-at-law (*i*). 4. Curators are liable for omissions as well as intromissions, with the exception of fathers, and those exempted by the father, in virtue of the Act 1696, c. 8. 5. They are also liable *singuli in solidum*, even though they have not intermeddled (*k*), under the same exception of those whom the father has appointed, in virtue of the Act 1696, c. 8, with an exemption from this liability (*l*).

Termination of curatory.

V. Curatory terminates in several modes, corresponding to those which have already been explained relative to tutory (*m*). It expires

(*a*) *Thomson* v. *Pagan*, M. 8985 (1781); *Ramsay* v. *Maxwell*, M. 9043 (1672), Gosford's Report; *M'Gibbon* v. *M'Gibbon*, 5 Mar. 1852, 14 D. 605, 1 Stuart 569; *Manuel* v. *Manuel*, 15 Jan. 1853, 15 D. 284.

(*b*) *Infra*, Part ii. chap. iv. sec. 2.

(*c*) *Gillespie* v. *Clark*, 22 Nov. 1821, 1 S. 160.

(*d*) Bankt. i. 7, 57; Wal. vi. 11, 509; Ersk. i. 7, 19; Hunter on Landlord and Tenant, vol. i. p. 162.

(*e*) Fraser, Pers. and Dom. Rel. vol. i. p. 243; Bankt. i. 7, 58; Dirl. and Stew. 109, 110, *v. Donat. inter vir. et ux.*

(*f*) *Supra*, p. 296.

(*g*) Ersk. i. 7, 26.

(*h*) M'Ken. i. 7, 19; Ersk. i. 7, 26.

(*i*) *Supra*, p. 298; Ersk. i. 7, 26.

(*k*) *Sinclair* v. *Sinclair*, M. 14696 (1686); Ersk. i. 7, 27; Stair i. 6, 36.

(*l*) Ersk. *ibid.*

(*m*) *Supra*, p. 308.

by the minor's arrival at majority, the age of twenty-one years; or by his having obtained a dispensation of age (*a*). Where several minors are under the same curatory, the office expires, as to each, on his arrival at majority, though the others may not yet have come to age (*b*). At the minor's majority, the duty of the curator and his powers at once cease (*c*). 2. The office terminates by the natural or civil death of the minor or curator (*d*). 3. By the marriage of a female curatrix (*e*), and of a female minor; the husband in the latter case becoming the curator (*f*).

Joint and simple nominations.

4. The curatory may be granted under some condition, the fulfilment of which brings the office to a close. These may be as various as it is capable to frame them; but the most common are those kinds of joint and simple nominations already explained (*g*). The rules here are somewhat different from those which obtain as to tutors. In tutory, if a *sine quo non* fail, or one of a quorum, or one of a joint nomination, the whole office has failed, and there is place for a tutor-at-law or dative. But, on the other hand, if a curator named *sine quo non* fail, or one of a quorum, or of a joint nomination, the entire nomination is certainly at an end, if the minor choose; but if he wish to keep it up in the remaining curators, he may do so without being obliged to renominate them, and have a new election. And this because he nominated them, or could have nominated them, at first; and as they have already gone through the ordeal of being laid open to objection from the minor's friends, it is unnecessary to compel them to adopt all these preparatory proceedings a second time. This is the opinion of Bankton, and it has been so decided (*h*). It has been, however, said, that the principles maintained in this judgment are not entirely agreeable to law, and that it is in all cases safest for the minor to make a new election in a formal manner (*i*).

(*a*) *Supra*, p. 146.

(*b*) Balf. p. 125; Ersk. i. 7, 29; *A.* v. *B.*, M. 16221 (1545). *Supra*, p. 308.

(*c*) *Lockhart* v. *M'Kenzie's Trs.*, 15 Dec. 1826; affd. 24 June 1829, 3 W. S. 481. *Supra*, p. 318.

(*d*) Bankt. i. 7, 62; Ersk. i. 7, 29; *Forbesses* v. *Forbes*, M. 16287 (1673). *Supra*, p. 308 *seq.*

(*e*) *Supra*, p. 309; Bankt. i. 7, 61 and 64; Ersk. i. 7, 29.

(*f*) Bankt. i. 7, 58 and 61; Ersk. i. 7, 29; Balf. p. 125, c. 17; Fraser, Pers. and Dom. Rel. vol. i. p. 245. *Supra*, pp. 76 and 348.

(*g*) *Supra*, p. 176 *seq.*; Ersk. i. 7, 30.

(*h*) Bankt. i. 7, 63; *Fairfoul* v. *Binnie*, M. 16277 (1666).

(*i*) Wall. p. 365, foot-note.

Removal as suspect.

5. Curators may be removed as suspect, in like manner as tutors, for the same reasons, and in the same mode (*a*). 6. After having accepted and acted, they cannot resign the office without permission of the Court (*b*); and this permission the Court are entitled to grant, upon 'reasonable causes' shown, in terms of the Act 1555, c. 35. But unless such reasonable causes be established, the nomination of curators 'shall not be revoked nor discharged.' The minor cannot of himself grant permission to a curator to resign, no more than he can elect one without the interposition of a judge (*c*). It is true that by the Act 1696, c. 8, persons who have accepted the office of tutors may decline that of curators, to which they have also been nominated. But this only applies to the case where they have declined to accept, and not to resignation after acceptance. 7. If a minor refuse to act along with the curators in reasonable acts of administration, the curators will be freed from their office by the Court (*d*).

Curators accounting with minors.

VI. On the expiration of the office of curatory, an accounting takes place between the minor and his curators, which, if not settled extrajudicially, is brought into Court by an action of count and reckoning. In settling this account, the curator, though merely an adviser, is held liable for the due and proper administration of the estate, as if he had been, like a tutor, the principal; seeing that he had his remedy, if the minor had not followed his advice. The principles of the accounting, the mode in which it is made, the prescription applicable to it, the presumption of *intus habet*, which have been explained as to tutory, apply here also (*e*). The office of curatory, like that of tutory, is gratuitous (*f*). The period from which the accounting must commence, is the date of the curator's acceptance of the office (*g*); and from this date his liability arises,

(*a*) *Supra*, p. 312; Stair i. 6, 36; Bankt. i. 7, 62; Balf. p. 124, c. 16; Ersk. i. 7, 29. See *Malcolm* v. *Webster*, 24 Nov. 1840, 16 F. 65.

(*b*) *Gordon* v. *Dunbar*, M. 16333 (1711); Ersk. i. 7, 29; Bankt. i. 7, 62 and 49; Stair i. 6, 36, *in fin.*

(*c*) Act 1555, c. 35; M'Ken. Obs. thereon; Stair i. 6, 36, *in fin.*; Bankt. i. 7, 49 and 62; *Scott* v. *Scott*, M. 16269 (1664).

(*d*) *Supra*, p. 369.

(*e*) Bankt. i. 7, 66; Ersk. i. 7, 31; *supra*, p. 318 *seq.*

(*f*) Ersk. i. 7, 15; *Scott* v. *Strachan*, M. 13433 (1736); *Bontine* v. *Grahame*, 20 Dec. 1838, 1 D. 286; *Kennedy* v. *Rutherglen*, 25 Jan. 1860, 22 D. 567.

(*g*) Ersk. i. 7, 20; M'Ken. Obs. on 1555, c. 35; *Scrymgeour* v. *Wedderburn*, M. 6357 (1675); *supra*, p. 325; *Bontine* v. *Grahame*, *supra*.

although he never intermeddled (as he ought to have done) with the estate (*a*). Seeing that the minor has the power of testing on his moveables, he is entitled to liberate curators by his latter will from the accounting and diligence to which they are liable at common law (*b*).

The action of accounting may be brought by the curator, to have his accounts examined, and himself discharged (*c*). Where the minor has discharged the curator extrajudicially, the usual course is for the curator to present a petition for delivery of his bond of caution, which will be granted after the usual intimations (*d*). Where curators in an inferior rank of life had acted *bona fide*, and for the advantage of the minor, the Court would not, after a settlement at majority, enter into a new accounting, merely because they had not made up inventories or found caution (*e*).

(*a*) Ersk. i. 7, 20, *in fin.*; *supra*, p. 305.

(*b*) Stair i. 6, 34.

(*c*) *Stark* v. *Tennent*, 11 Feb. 1843, 5 D. 542.

(*d*) *Rintoul*, 21 Jan. 1861, 23 D. 357; *Young*, 25 Feb. 1864, 2 Macph. 695. See *infra*, as to discharge of factors appointed by the Court.

(*e*) *Williamson* v. *Williamson*, 30 June 1815, F. C.

CHAPTER IV.

POWERS OF MINORS AND CURATORS JOINTLY, AND POWERS OF MINORS ALONE, HAVING CURATORS.

SECTION I.

POWERS OF A MINOR WITH CONSENT OF CURATORS.

A MINOR, with consent of his curators, has no higher powers than a minor who has none; and these powers may be stated to be the same which a person of full age has over his property, with certain exceptions; his deeds being subject also to reduction on the head of minority and lesion.

What deeds a minor and curators may grant.

A minor, with consent of his curators, may borrow money (*a*); enter into submissions, or compromise disputed rights and claims (*b*); renounce to be heir (*c*); appoint factors with salaries, for the management of the estate (*d*); present to a church (*e*); sell the moveable or heritable estate, and this without any authority from the Court, as is necessary to tutors (*f*).

Leases by minor and curators.

They may grant leases for the same endurance as ordinary proprietors. By not distinguishing between the powers of tutors and those of curators, Erskine has on this subject laid down the law

(*a*) *Harkness* v. *Graham*, 28 June 1836, 14 S. 1015.

(*b*) Ersk. i. 7, 18, and Prin. i. 7, 11; *Williamson* v. *Fraser*, M. 8965 and 665 (1739). See the authorities *supra*, as to tutors, p. 244.

(*c*) *Bannatyne* v. *Roomes* (1664), 2 Sup. 362.

(*d*) Stair i. 6, 36; Ersk. i. 7, 16.

(*e*) *Brown* v. *Johnstone*, 9 June 1830, 8 S. 899.

(*f*) Bankt. i. 7, 52; Ersk. i. 7, 33; *Hamilton* v. *Sharp*, M. 8981 (1630); *Hume* v. *Fish*, 1 Sup. 94 (1636); *Clerk* v. *Gordon*, M. 3668 (1699); *Wallace* v. *Wallace*, 8 March 1817, F. C., 1 Bell's Com. 134, overruling *Campbell* v. *Campbell* (1738), M. 8930; *supra*, p. 338.

with some appearance of confusion (*a*). He says, that leases granted by curators 'must necessarily determine or expire with the granter's office: *Resoluto enim jure dantis, resolvitur jus accipientis;* and if a lease granted by a tutor or curator be so conceived as to last longer than his office, the minor, after the tutory or curatory is at an end, may recover the natural possession of his own lands.' This is the rule applicable to tutors alone. The curators *consent* to the lease, but they are not the principals in the transaction, and consequently it does not fall at the expiry of their office. The case mentioned by Erskine (*b*) refers to a lease granted by a tutor. Mr Bell, in his Dictionary, endeavours to reconcile Erskine's doctrine with principle, by drawing a distinction which also seems untenable. He says, that a lease granted by curators *alone*, without the minor, necessarily determines with their office; while a lease by the minor himself, with consent of his curators, will be as effectual for the whole stipulated period of endurance as it would be if granted after majority (*c*). The answer to this is, that no act whatever by the curators alone, without consent of the minor, is valid (*d*). Erskine's doctrine, moreover, is inconsistent with earlier and later authorities, which settle, that a lease by a minor, with consent of his curators, may be granted for as long a period as by any proprietor *sui juris*, subject to the minor's right of challenge on the ground of lesion. Thus a lease by a minor for nineteen years, with consent of his curators, was held effectual, not merely during his minority, but for the whole period (*e*). Such also is the rule laid down by the later writers (*f*). A minor and his curators may let the whole estate as one farm; but the minor may afterwards prove that the act was to his lesion, and so get it reduced (*g*). Minors, with consent of their curators, may also give leases at a lower rent than was previously obtained, without being obliged to expose the farms to public auction, as tutors were (at least by the old decisions) bound to do. Erskine here again mixes up the case of a minor having curators, with a tutor, and allows no higher power to the former

(*a*) Ersk. i. 7, 16; so also Craig ii. 10, 1; Bankt. ii. 9, 18.

(*b*) *A.* v. *Huntly*, M. 16285 (1672).

(*c*) Bell, Dict. *v.* Curatory.

(*d*) *Supra*, p. 366.

(*e*) *Alexander* v. *Thomson*, Hume, p. 411 (1813).

(*f*) 1 Bell's Com. 134; Ivory's Note to Ersk. i. 7, 16; Hunter, vol. i. p. 161.

(*g*) *Munro* v. *Munro*, Elch. *v.* Minor i. (1735).

than to the latter (*a*). Baron Hume corrects the error, and explains the difference between the interposition of a tutor and curator in such transactions. 'There is an obvious distinction,' says Baron Hume, 'in this matter, between a tack let by a tutor, and one let by a minor and his curators. A tutor acts for, and instead of the owner of the land, whom the law does not recognise as a person, or as having a will of his own. The minor *pubes* acts for himself, as owner of the land; and the law acknowledges him as a person who has a will of his own, and is entitled to administer his property according to his own pleasure, provided only he have his guardian along with him to guide his inexperience, and supply the immaturity of his judgment. When duly authorized, the minor's tack attaches, therefore, naturally to the property, and is as good as that of a major for the whole stipulated term of years, except to the single effect of being open to his favourable privilege of restitution for minority and lesion. The same is equally true of a sale of the lands made by a minor with the like authority' (*b*). The minor, with his curators' concurrence, may remove tenants (*c*); and in one case the Court held that the minor himself, without his curators, could institute such a process, as it was to his benefit (*d*).

Actions at the instance of minors having curators, and against them.

Actions at the instance of a minor having curators must be, in general, instituted with consent of both, otherwise they will be dismissed (*e*); but there are exceptions to this rule. Thus a minor near majority had right to a title-deed, which was withheld from him. His father, as his guardian and administrator-in-law, raised an action for its recovery in his own name, without naming the son as a pursuer. The Court held that this was a sufficient instance. Lord Cuninghame said, that 'a father has a sufficient title in his own person, as his minor son's guardian and administrator-in-law, to recover and demand the custody of the muniments of the minor's estate. It is not thought that even the concurrence of the minor is required for that, because it is the right of the father, in virtue of his office, to keep his ward's title-deeds till he comes of age.' Lord Moncreiff said: 'With respect to the minor, though he does not personally concur, his father acts as curator for him, and in this

(*a*) Ersk. i. 7, 16.
(*b*) Hume, Decis. p. 411.
(*c*) Ersk. i. 7, 16.
(*d*) *Ardross* v. *Dishington*, M. 8938 (1566), *sed quære*.
(*e*) Ersk. i. 7, 24.

character has right to recover the muniments of the estate for his behoof; although, without the minor's concurrence, he might not be entitled to demand payment, or grant a discharge of any right that might be competent, or debt due to him under those documents' (*a*). It will be observed that the Court rested their decision in this case on the special ground, that a curator is the proper party to hold the muniments of the estate; but left untouched the general principle of law, applicable to other matters of administration, that the curator, being a mere adviser, could do nothing of himself, without consent of the minor. In former cases, again, the decisions found the minor entitled, without the consent of the curators, to recover his title-deeds (*b*). The correct rule of law, which is sanctioned by principle, and in accordance with almost all the authorities, is, that the minor ought to act, the curators to advise; and that both should concur in every transaction. Curators, accordingly, have no title to insist in an action which the minor disclaims (*c*). In an application for leave to feu under the Entail Amendment Act, by the minor heir in possession and his curators, the affidavit was subscribed only by the minor, the Court, without expressing an opinion, thought that *ob majorem cautelam*, it should be subscribed by one of the curators (*d*).

An action *against* a minor must be directed also against his curators; and if they be not made parties to the suit, it will be dismissed (*e*), but they may be cited by an incident diligence after the action is in Court (*f*). Curators need not be certiorated in extrajudicial acts, such as warnings (*g*). In a recent case, where one of two heirs portioners pursued the other, who was minor and resident abroad, for sale and partition of the estate, the Court required due intimation to the minor and the guardian appointed by the foreign country, of the dependence of the action, and sus-

(*a*) *M'Kirdy* v. *M'Lachlan*, 29 May 1840, F. C.

(*b*) *Haddo* v. *Mowatt*, M. 8940 (1629); *Haddo* v. *Ludquhairn* (1629 and 1630), M. 16252 and 16254.

(*c*) *Allan* v. *Walker*, 1812, Hume 586.

(*d*) *Hastings*, 13 July 1849, 12 D. 918.

(*e*) Ersk. i. 7, 24.

(*f*) *Brown* v. *Wilson*, 15 Jan. 1842, Lord Ordinary's note.

(*g*) *Bennett* v. *Turnbull* (1628), M. 2181. See also *French* v. *French* (1622), M. 2179 and 8524; *Urquhart* v. *Barclay* (1639), M. 840.

tained as sufficient evidence of such intimation, a docquet in the handwriting of the guardian, approving of the proceedings as advantageous to the ward (*a*). A decree of adjudication was found null, because the tutors and curators were not charged on the special charge (*b*); and diligence on a bill, accepted by a minor, without concurrence of curators, and directed against the minor alone without reference to the curators, was suspended as irregular (*c*). The citation to the minor is personal or at his dwelling-place; to the curators it is edictal, in the same manner as to tutors (*d*); but if a special warning or citation be given to curators *nominatim*, it is sufficient (*e*). It is *pars judicis* to see that the citation is regular. Accordingly, where a petition for the removal of a trustee, who was also tutor and curator to a pupil and two minor children, had been served on the trustee not only for his own interest personally, but also as tutor and curator for the children, the Court, before further answer, ordered service on the minors themselves, holding the service on the curator alone as insufficient to cite them (*f*). There is a peculiarity with regard to processes of multiplepoinding. Where minors having curators are the nominal raisers, the real raiser cannot institute the action in the minor's name alone; he must use the names of some of the curators, though not of all. With regard to the intimation which must be given to all nominal raisers, in terms of the Act of Sederunt, 11 July 1828, it is sufficient if made to the minor himself; there being a difference between a mere intimation and a citation (*g*). If a father or the minor's administrator refuse to concur with him in actions, a curator *ad litem* will be appointed (*h*).

Decree enforced only

Where a decree has gone against a minor and curators, it is the

(*a*) *Frizell* v. *Thomson*, 9 June 1860, 22 D. 1176.

(*b*) *Robertson* v. *Creditors of Robertson*, 31 Jan. 1805, stated in 1 Bell's Com. p. 743; *Brakenridge*, 1809, stated 1 Bell's Com. 706.

(*c*) *Wilkie* v. *Dunlop*, 28 Feb. 1834, 12 S. 506.

(*d*) *Supra*, p. 274 *seq.*; and Ersk. i. 7, 24.

(*e*) *Cairnoussie* v. *Techmurie* (1629), M. 2181; see M. 13454 and 1 Sup. 299; *Erskine*, 6 Feb. 1852, 1 Stuart 376, 14 D. 766.

(*f*) *Mrs Mary Johnstone* or *Gibson*, petr., 28 Feb. 1865, Second Division, not reported.

(*g*) *Robertson* v. *Niven*, 26 May 1829, 7 S. 421.

(*h*) *Haddo* v. *Ludquhairn* (1629), M. 16252; *M'Conochie* v. *Bennie*, 2 March 1847, 9 D. 791.

former alone who is liable to personal diligence (*a*). This flows from the doctrine, that the minor is the principal, and the curators merely subordinates. Erskine in this matter, again, in mixing up the law of tutor and curator, writes as if the latter were bound to manage like the former, and that they incur the same responsibilities, and are liable to the same pains of imprisonment, etc., for non-performance (*b*). Where, therefore, a curator consents to a deed of the minor,—to the borrowing of money, or the contracting of any other obligation,—he is not the party against whom diligence can be executed, nor is he held bound as cautioner by his merely giving his consent (*c*). Arrestments are lodged in the hands of the minor, not of the curators (*d*); but the curators should be called in the furthcoming (*e*); and a judicial reference is made to the oath of the minor, not of the curator (*f*).

against the minor.

SECTION II.

POWERS OF A MINOR WITHOUT CONSENT OF CURATORS, WHEN HE HAS THEM.

I. The minor is entitled, without consent of his curators, to do every act which does not affect the property subjected to the curatorial administration. As by marriage, he only—immediately at least—binds his person, and does not interfere with his estate, that act he is entitled to do, without the concurrence of his curators (*g*).

What he may competently perform.

A minor also, without their consent, may execute a testament (*h*). The property over which the minor has liberty to test, is, in general terms, his moveable estate. There are cases, however, where, though the property is indisputably moveable, this right has been

Power of testing.

(*a*) *Thomson* v. *Ker*, M. 8910 (1747), Bankt. i. 7, 47; *Gordon* v. *Gordon*, M. 16238 (1610).

(*b*) Ersk. i. 7, 24.

(*c*) *Drummond* v. *Cunninghamhead*, M. 16244 (1624).

(*d*) *Gibson* v. *Murray*, M. 2777, Elch. *v.* Arrestment, No. 27 (1748); *Binning* v. *M'Dowall*, M. 736 (1738); *Robertson* v. *Kerr*, M. 2184 (1687).

(*e*) *Robertson* v. *Kerr*, *supra*.

(*f*) *Supra*, p. 339.

(*g*) Bankt. i. 7, 58; Ersk. i. 7, 33; Fraser, Pers. and Dom. Rel. vol. i. p. 45. See *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265; *French* v. *French* (1622), M. 2179 and 8524.

(*h*) Bankt. i. 7, 59; Ersk. i. 7, 33. *Yorkston* v. *Burns*, M. 8950 (1697); *Stevenson* v. *Allans*, M. 8949 (1680).

denied. Where it has been left to the minor, under an express or implied condition, that the substitution, appointed by the donor, shall not be altered in minority, the minor cannot exercise the privilege of testing. This is entirely a *quæstio voluntatis*, where each case must be decided on its own peculiar circumstances (*a*). It has been said, that a minor cannot by any deed *inter vivos*, granted without the consent of his curators, alter the succession of his *moveable* estate, and that he cannot do so except by way of testament; so that he could not lend out his money, and take a bond to himself and any particular series of heirs (*b*). But Professor More has said, that this doctrine 'seems to rest on no solid foundation, as it virtually denies to a minor the power of regulating the succession of his moveable property' (*c*).

The minor may bequeath all his moveables to his curator, and hence the maxim *tutor auctor, etc.*, does not here apply (*d*). There must, however, be no unfair means employed to obtain the bequest. 'If importunity had been alleged, by urging the defunct by reiterated desires, threats, or sharp words, to any particular way of disposal, by which defuncts might not be in tranquillity to die in peace, but might be obnoxious to such importunity, the Lords might have inquired into the matter of fact' (*e*); and in another case, the Court repelled the objection to a testament, in favour of curators, unless the objectors 'would condescend either on methods of persuasion, or threatenings used to make the same' (*f*). From these authorities it appears, that grounds much less than are required for the reduction of an ordinary will, would be sufficient to set aside one in favour of curators.

Presenting to a church. Mercantile obligations.

Some writers hold that a minor may, without consent of curators, present to a church (*g*); but this doctrine has been denied by

(*a*) See these cases, where the right was denied to the minor, on account of its being implied in his right, that he was not to alter the destination of the bonds or other moveables:—*M'Culloch* v. *M'Culloch*, M. 8965 (1731); *Yorkston* v. *Burn*, M. 8950 (1697); *Waddell* v. *Waddell*, M. 8965 (1739).

(*b*) 5 Sup. 861; Ersk. i. 7, 33.

(*c*) More's Notes, p. xlvii.; Lectures, vol. i. p. 115.

(*d*) *Craick* v. *Napier*, Elch. *v.* Minor 7, M. 4325 and 16342, 5 Sup. 667 (1739); *Stevenson* v. *Allans*, M. 8949 (1680); *Yorkston* v. *Burn*, M. 8950 (1697), Bankt. i. 7, 59.

(*e*) *Stevenson, ibid.*

(*f*) *Yorkston, ibid.*

(*g*) Bankt. ii. 8, 100; More's Notes to Stair, p. xliii.; Lectures, vol. i. p. 113.

others (*a*), and there is no decision on the point. He may become a merchant, or tradesmen; and the bills and other documents necessary for the conducting of his business are valid, though granted by himself alone (*b*).

His deeds valid, if minor be guilty of fraud.

In several other matters, the deed of a minor, without consent of curators, will be sustained; not because the law holds that he has power to grant such deeds, but because, from his own conduct, it holds him barred from pleading the objection. If he act fraudulently, or if the transaction be *in rem versum* of him, he cannot demand that the deed be set aside (*c*). This subject will be considered afterwards in treating of *restitutio in integrum* (*d*).

Deeds to the pupil's advantage upheld, though without consent of curators.

Under the head of deeds which are remuneratory, and for his own favour and advantage, comes the case of a beneficial marriage contract entered into by the minor, without consent of his curators. The Court have held this to be a deed which could not be set aside without proof of lesion; and much interesting discussion took place in a recent case as to a minor's powers without his curators. The Lord Ordinary (Curriehill) upheld the contract upon the ground, that there was no proof that the curators had accepted; but on the general question he indicated his opinion thus:—'At the debate, the defender maintained, that an antenuptial marriage contract is not a nullity, although one of the parties thereto be a minor under a curatory, and yet is not authorized by his curators to enter into the contract. That question is not free from difficulty. On the one hand, the marriage itself is in such circumstances valid, although it be entered into without the concurrence of the minor's curators; and the marriage *ipso jure* would operate as a transfer of all the wife's moveables, however valuable, to her husband, while there might be no good security for rendering available the legal rights of the wife or the issue of the marriage. If the wife were a minor, and the marriage were entered into without the consent of her

(*a*) Connell on Parishes, p. 520.

(*b*) *Craig* v. *Grant*, M. 8955 and 9035 (1732); and *infra*, Part iii. chap. i. III.

(*c*) Stair i. 6, 33; Ersk. i. 7, 33; *M'Adam* v. *Lag*, M. 8939 (1605); *Drummond* v. *Broughton*, M. 8939 (1627); *Inglis* v. *Sharp's Exrs.*, M. 8941 (1631); *Stuart* v. *Stuart*, M. 8943 (1639); *Corser* v. *Deans*, M. 8944 (1672); *Rynd* v. *Dunfermline*, M. 8942 (1634); *Renton* v. *Stewart*, 1 Sup. 409 and 419 (1649); *Hamilton* v. *Lockhart*, 4 Sup. 78 (1693); *Hamilton* v. *Lamington*, M. 8949 (1678); *Gordon* v. *Galloway*, M. 8941 (1629); *Harvey* v. *M'Intyre*, 7 March 1829, 7 S. 561.

(*d*) *Infra*, Part iii. chap. i. III.

curators, would she be under an absolute disability to protect herself and her issue against the effects of that legal transfer, by entering into a fair and suitable contract? The question does not appear to have been decided, whether or not such a contract, when it creates no lesion, is to be set aside as a nullity. And, as the Lord Ordinary thinks there are sufficient grounds for deciding the present case without entering into that question, he reserves his opinion upon it.'

In the Inner House, Lord Ivory said: 'It is maintained that there is to be an absolute nullity. Now, it must be a nullity on both sides. It is a nullity by which, after a long lapse of time, and after obtaining valuable provisions, she may throw loose the contract. In short, it seems to me that if anything is to be said against an antenuptial contract, it is not enough to say that it was entered into without the concurrence of curators. It must be shown that the voluntary provisions are injurious, inasmuch as they exceed what the law would have operated against her. What may be the case, should the pursuers enter on the other ground of challenge, I shall not say. It may be there is great lesion, or great benefit. If benefit, then the contract would stand good; if lesion, the lesion must be established. In the sister country, the husband is brought before the Court of Chancery, and forced to enter into the necessary provisions. It is not a case which I would assimilate to a claim of restitution, where it must be urged within four years; for she has the privilege of challenging the deed, and that is a privilege which belongs to them all through. I do not think the doctrine of the nullity of a deed, entered into by a minor without the consent of his curators, is so absolute as to undergo no qualification. There are other instances which might be mentioned, as showing that the general doctrine of the nullity of acts done by a minor without his curators undergoes some qualification; as, for instance, where the minor enters into trade, or where a minor grants a bill, could it be said that such transactions, if the minor has curators, shall not be good? I do not wish to impugn the general doctrine, that deeds entered into by a minor, without the consent of his curators, are null; but only pointing out such modifications as the peculiar case of marriage calls for.'

And the Lord President (M'Neill) thus expressed his views:

'The sounder view to take is, that as she can enter into the contract of marriage, she can regulate her own interests beneficially by that contract. The law gives certain rights which are said to be fair and equitable, but it does not preclude the minor getting greater advantages. But if anything be done to the prejudice of the minor, the law will give redress. There are a number of exceptions to the general rule, that minors cannot bind themselves without the consent of their curators' (*a*).

Where minor's act refers to trifling matters.

Where the transaction is of small moment, and no apparent advantage is to be obtained by the minor, in giving effect to his legal plea, the Court will not interfere. Although the trifling value of the subject in dispute will not alter the rule of law, this circumstance will affect its application. Craig says: 'I have seen it decided in Court, in things not of great moment, as the rents of a single year, that discharges of them were valid, though granted by the minor, without consent of his curators' (*b*). It has been already seen, that the Court refused to sustain such discharges (*c*); but although the illustration of the principle stated by Craig fails, yet the principle itself remains. The purchase of a horse was held valid, though the curators did not consent (*d*).

What a minor cannot do without curator's consent.

II. The general rule is, that a minor having curators cannot execute any deed *inter vivos*, or enter into any transaction relative to his estate, heritable or moveable, without the consent of his curators; and all such deeds or transactions are void and null under the exceptions already stated. Lord Kames controverted this doctrine upon the following grounds: that Scotch lawyers have borrowed the rule from commentators on the Roman law, who have misinterpreted that law; for by the common law of the Romans, a deed so executed was valid, and the remedy applied was by the Prætor granting an exception to it in equity (*e*). The text, to which Lord Kames refers, has formed the subject of many learned dissertations among the civilians, the greatest of whom, however, have interpreted it in the same manner as all the Scotch lawyers (with the exception of Lord Kames) have done, namely,

(*a*) *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265.

(*b*) Craig ii. 20, 16.

(*c*) *Supra*, p. 366; *infra*, p. 387 (*e*).

(*d*) *Brown* v. *Nicolson*, M. 8940 (1629).

(*e*) Kames' Elucid. Art. I.

that the minor's deed *inter vivos*, without consent of his curators, was null *ipso jure* (*a*). This rule is now quite fixed in our law, and has been exemplified in many forms, and by a multitude of decisions. Fountainhall thus states the law of his day, which every succeeding decision has supported: 'A deed done by a minor having curators, without their consent, is an act absolutely null of the law, needs no revocation, no reduction, may be quarrelled at any time thereafter, *etiam quadriennio elapso;* imports lesion, without any other probation; may be objected, at any part of the process, *via exceptionis vel replicæ*, the party only proving that they had curators the time of the said deed; yea, to sum up all, it is so far null, that an oath ties him not to the observance of any contract made by him without consent of his said curators, but restores him against the same; because the said deeds being *ipso jure* null, there is no act whereto the oath can be accessory' (*b*).

What deeds by minor without consent of curators are null.

The Court have accordingly found to be *ipso jure* null (because the curators had not consented with the minor), tacks (*c*), bills, bonds, and dispositions or sales (*d*), contracts (*e*), cautionary obligations (*f*), factories, commissions, or mandates (*g*), and other

(*a*) Vinnius Tract. de Pactis, cap. xiv. No. 13; Noodt, Opera, vol. i. pp. 542 and 3; Bockleman, vol. ii. p. 239; Warnkönig, Comment. vol. ii. p. 62, and vol. iii. p. 182; Mackenzie's Roman Law, p. 140. On the other side see Heinec. Com. Pandect. Pars i. No. 368; Huber, Diss. lib. iii. p. 504, new ed.

(*b*) 2 Sup. 626. See the reason for the rule in Craig i. 12, 30.

(*c*) *Seton* v. *Caskieben*, M. 8939 (1622); *Cardross* v. *Hamilton*, M. 8951 (1708), reversed (1712) Rob. App. 37, apparently on the ground of homologation; *Kincaid* v. ——, M. 8979 (1561).

(*d*) *M'Kenzie* v. *Fairholm*, M. 8961, Dirleton's Report (1666); *Robertson* v. *Oswald*, M. 8980 (1584); *Hamiltons* v. *Hamilton*, M. 8981 (1587); *Campbell* v. *Lovat*, M. 9035 (1731). In this case the minor, when he granted the bond, was *majorennitati proximus*, and had a commission in the army, and yet for want of the father's consent it was found void and null. *Airth* v. *Laird*, M. 8938 (1602); *Bell* v. *Wilson*. M. 8943 (1639); *Bell* v. *Crawford*, M. 16310 (1687); *Harvie* v. *Gordon*, M. 5712 (1726); *Rentone* v. *Stewart*, 1 Sup. 419 (1649); *Kincaid* v. ——, M. 8979 (1561).

(*e*) *Thomson* v. *Pagan*, M. 8985 (1781); *Bruce* v. *Bruce*, M. 16231 (1569).

(*f*) *Bell* v. *Sutherland*, M. 8985 (1728); *Wall* v. *Brownlee*, M. 9035 (1724). The Court found the cautionary obligation in this case null, though it was offered to be proved, that at the time of signing the minor was habit and repute major, kept shop, was married, and had public trade for some time before he became cautioner. *Paterson* v. *Wishart*, M. 16241 (1613); *Drummond* v. *Cunninghamhead*, M. 3465 (1624). The Court annulled the bond in this case, though the minor wanted only twelve or eighteen hours of majority.

(*g*) *Nisbet* v. *Dickson*, Elch. v. Minor 5 (1737).

deeds inferring an obligation against the minor's property, such as an obligation to pay money to his sister, constituted by her marriage contract (*a*), assignations (*b*), services of the minor as heir to an ancestor (*c*), a renunciation to be heir to the ancestor (*d*); and a payment of a debt made to a minor, without the consent of the curator, would not be a valid payment, so that the money could again be demanded by the minor and curators from the debtor (*e*), unless the latter prove that the money had been applied *de in rem verso* of the minor (*f*). An indenture by a minor, without consent of his curators, would be null (*g*). Besides the decisions now referred to, the unanimous authority (with the exception of Lord Kames) of institutional writers to the same purpose may be stated (*h*). The nullity may be pleaded not only during the *quadriennium utile*, but also during the long prescription (*i*). It would seem that, after the expiry of the forty years, the plea is met by contrary presumptions, which render it irrelevant (*k*). If the minor choose to go on with the contract, it is incompetent for the other party to plead the nullity (*l*).

How debts due to a minor are to be recovered.

A debtor paying a debt to a minor and his curators, ought to obtain the receipt of both, as the discharge of one without the other is ineffectual (*m*). The actual payment of the money may be made to either; perhaps the safer course would be to hand it

(*a*) *Maxwell* v. *Nithsdale*, M. 8942 (1632). 'It was reduced by the Lords, though the action was moved forty or forty-five years' after the obligation was granted. See, however, *Bruce* v. *Hamilton*, *supra*.

(*b*) *Craig* v. *Lindsay*, M. 8956, 5 Sup. 861 (1757).

(*c*) *Simpson* v. *Balgony*, M. 2729 (1627).

(*d*) *Bannatyne* v. *Roome* (1664), 2 Sup. 362.

(*e*) Ersk. i. 7, 24, *in fin.*, and i. 7, 37; Stair i. 6, 33; *Cunningham* v. *Curators*, M. 16325 (1707).

(*f*) *M'Adam* v. *Lag*, M. 8939 (1605); *M'Nab* v. *Culdair*, 4 Sup. 237 (1695), and other cases, *infra*.

(*g*) *Kennedy* v. *Scot*, 1 Sup. 747 (1675); *Low* v. *Henry*, 14 Nov. 1797, Hume, p. 422.

(*h*) Balf. p. 124, c. 13; Craig i. 12, 30, and ii. 20, 16; Stair i. 6, 33; Elch. Annot. p. 34; M'Ken i. 7, 9; Bankt. i. 7, 56; Ersk. i. 7, 33.

(*i*) *Robertson* v. *Oswald*, M. 8980 (1584); *Maxwell* v. *Nithsdale*, M. 8942 (1632); *Hamiltons* v. *Hamilton*, M. 8981 (1587); *Bell* v. *Sutherland*, M. 8985 (1728); *supra*, p. 386 (*b*); *Manuel* v. *Manuel*, 15 Jan. 1853, 15 D. 284.

(*k*) See *Thomson* v. *Stewart*, 11 Feb. 1840, 2 D. 564.

(*l*) Stair i. 6, 33; Bankt. i. 7, 56, and i. 7, 59; Ersk. i. 7, 33. See for a like rule as to married women, Fraser's Personal and Domestic Relations, vol. i. pp. 253–5.

(*m*) *Supra*, as in (*e*), and p. 366.

over to the curators (*a*). It has been seen that there is some doubt whether a minor not having curators can uplift an heritable debt (*b*). There do not appear to have been any doubts started on this subject with regard to a minor having curators.

SECTION III.

DEEDS WHICH A MINOR CANNOT DO EVEN WITH CONSENT OF HIS CURATORS.

Cannot alter the course of succession to heritage.

Referring to what has been already said on this subject, relative to the powers of minors who have no curators (*c*), it is here only necessary to add, that no minor, even with the consent of his curator, can alter the succession to his heritable estate by any gratuitous deed (*d*). So strictly is this rule enforced, that a deed of this kind, executed by a minor seventeen years of age in favour of his father and sisters, to the exclusion of a distant relation, was reduced (*e*). So was a remuneratory donation to a brother uterine, though the minor was twenty years of age when he executed the deed (*f*). So far is the principle carried, that if the minor's father were to execute a deed on deathbed, altering the old investitures of his own estate, the right to challenge the deed could not be renounced by his minor heir; and any subsequent heir could get it set aside, notwithstanding the homologation of it by a prior heir who died in minority (*g*). But the rule applies only to changes of succession from heritable to moveable, and not to those from moveable to heritable. The reason is, that a minor may, even without consent of curators, execute a testament bequeathing his moveable property according to his pleasure; and it follows *a fortiori*, that he can, with consent of his curators, execute any deed by which the succession to such property is to be changed (*h*).

(*a*) Wal. p. 365.
(*b*) *Supra*, pp. 337–8.
(*c*) *Supra*, p. 340 *seq.*
(*d*) Dirl. and Stew. *v.* Minor; Bankt. i. 7, 54; Ersk. i. 7, 18, and i. 7, 33; *M. of Clydesdale* v. *Dundonald*, M. 8964 and 1265; Robertson's App. 564 (1726).
(*e*) *Cunningham* v. *Whytford*, M. 8966 (1797).
(*f*) *Hunter*, M. 8964 (1728).
(*g*) *Irvine* v. *Tait*, M. App. *v.* Deathbed 6 (1808).
(*h*) Ersk. i. 7, 18, *in fin.*

Hazardous speculations. Donations.

Stair lays it down, that a minor cannot, even with consent of curators, enter into transactions 'where hazard predomines' (*a*); and it has been found that he cannot, even with such consent, make donations, or gratuitously discharge debts (*b*).

(*a*) Stair i. 6, 36.

(*b*) *Saltcoats* v. *Justice-Clerk*, M. 8958 (1623); *Lockhart* v. *Lockhart*, M. 8958 (1626); *Seaton* v. *Hepburn*, M. 8959 (1633); *M'Culloch* v. *M'Culloch* (1731), M. 8965.

PART THIRD.

PRIVILEGES OF MINORS.

CHAPTER I.

RESTITUTION BY MINORS ON THE GROUND OF MINORITY AND LESION.

ONE of the most important of the privileges of minors is, that of being restored against deeds executed by them, or their tutors or curators, to their lesion. This is a privilege which has been adopted into the law of Scotland from that of Rome; and 'as we have no statute law to direct us in this point, we observe the Roman with little or no exception' (*a*). It is true that rescission of contracts is sometimes granted to persons of full age; but the cases in which this is allowed resolve themselves into transactions where no contract had ever been constituted; where force, fraud, change of status, error *in essentialibus*, or absence, have, singly or combined, been present, so as to vitiate the consent necessary to contract (*b*). The peculiarity in the case of minors is this, that though the consent be not vitiated by any such intrinsic nullity, they may get the deed set aside solely by establishing that they are injured by it; and this, whether the injury has arisen from having been imposed upon by others, or from having been mistaken in their own interest, —the foundation of the rule being altogether irrespective of the honesty or knavery of those with whom they have transacted, and

(*a*) Erak. i. 7, 34.

(*b*) Dig. iv. 6, 26, 9; Dig. iv. 5; Gaii, Inst. iv. s. 38; Jul. Paul. Sentent. i. 7, 2.

to whom it is no defence that they acted with the most perfect *bona fides*. This was the doctrine of the Roman law (*a*); and the law of Scotland has followed it. It is not necessary to plead anything but the minority and lesion of the minor; whether there was fraud on the side of the other party is not inquired into.

This is a privilege which only subsists for four years after majority, and which are therefore called *anni utiles*, or *quadriennium utile*.

Who entitled to restitution.

I. The deeds of a pupil, and those granted by a minor having curators without their consent, are *ipso jure* null; and to them, therefore, this branch of law has no application (*b*). It is only those deeds which are valid till reduced, that require the remedy of restitution. Deeds by a tutor (*c*), by a minor alone (*d*), by a minor with consent of ordinary curators (*e*), or of fathers (*f*), by a minor wife with consent of her husband (*g*), are the class of deeds reducible at the instance of the minor, on his establishing lesion; and the authorities referred to show how, in such cases, the law was applied.

Professional knowledge of the minor does not bar the plea.

This privilege, competent to minors, will be given, although it be proved that the party seeking it was as capable as any major, on account of natural ability or professional knowledge, of attending to his own interest. It is true that there are certain recognised exceptions to the law, which will be afterwards explained, but these are irrespective of the personal abilities of the minor. The mere circumstance of being a writer, and therefore presumed to know

(*a*) Dig. iv. 4, 1; Dig. iv. 4, 44; Code ii. 22, 5.

(*b*) *Thomson* v. *Pagan*, M. 8985 (1781); *Bell* v. *Sutherland*, M. 8985 (1728); *Bruce*, M. 8979 (1577); *Kincaid* v. —— (1561), M. 8979. But see *Bruce* v. *Hamilton*, 17 D. 265, *supra*.

(*c*) Code ii. 25, 2; Vinn. Partit. Juris. c. xlv. p. 405; Balf. p. 179. c. 2; Ersk. i. 7, 34; 1 Bell's Com. 132.

(*d*) *Morrison* v. *Arbuthnot*, 1 Paton Appeals 7 (1728); *Moncrieff* v. *Mitchell*, M. 8996 (1729); *Thomson* v. *Pagan*, M. 8985 (1781). A bill granted by a party just after majority to his curator, before accounting, cannot be reduced.—*Bennett* v. *Reid's Trs.*, 27 May 1828, 6 S. 854.

(*e*) Code ii. 25, 2; Vinn. *ut supra*; Stair i. 6, 44, third sentence; Bankt. i. 7, 74; Ersk. i. 7, 34. *Munro* v. *Munro*, Elch. *v.* Minor 1 (1735); *Blantyre* v. *Walkinshaw*, M. 8991 and 2215 (1667); *Thomson* v. *Stevenson*, M. 8982 (1666); *Stuart* v. *Stuart*, M. 9008 (1638); *Vernock* v. *Hamilton*, M. 9047 (1637); *Harkness* v. *Graham*, 20 June 1833, 11 S. 760.

(*f*) Dig. iv. 4, 29; *Rose* v. *Rose*, 20 Nov. 1821, 1 S. 154.

(*g*) *Hamilton* v. *Boswal*, 5 Sup. 21, and Robertson's Appeals 346 (1718); *Gibson* v. *Scoon*, 6 June 1809, F. C.

the law, is not a sufficient answer to the minor's plea (*a*). Nor would it be barred by the minor being married and forisfamiliate (*b*). In short, the privilege is given solely to minority; and, accordingly, when that is past, it is just the converse rule which holds, namely, that however great may be the facility, and however enorm the lesion, and however short the period since the party attained majority, if there be no fraud on the part of the other contractor, the deed stands valid (*c*).

Privilege competent to minor's heirs.

The privilege is also competent to the heirs of the minor lesed (*d*). But if the deed sought to be reduced were not hurtful to the minor ancestor, it would be incompetent to reduce it, because *restitutio in integrum* is only granted against deeds hurtful to the party by whom or for whom they are made (*e*).

There is some doubt as to how the *quadriennium utile* is to be computed in the case where restitution is demanded by the minor's heir. Lord Stair holds that the same rules apply in this case as have been settled relative to the redemption of apprisings or adjudications (*f*). 'There being no speciality,' says his Lordship, 'as to minority in apprisings and other rights, this rule is to be followed in all cases of minority' (*g*). But the other authorities have condemned this opinion, holding, in the words of Mackenzie, that the privilege of minority, 'as to the expiring of the legal of apprisings, is special and singular' (*h*); and that the rules on this subject are those of the Roman law (*i*). The only decision on this point is

(*a*) *Dundas* v. *Allan*, M. 9034 (1711); *Henderson* v. *Lafreis*, M. 5881 (1696); *Corser* v. *Deans*, M. 8944 (1672). See a large number of authorities on this point, Vinn. Partit. c. xlv.

(*b*) *Dundas*, *supra*; *Wall* v. *Brownlee*, M. 9035 (1724); *Anderson* v. *Cation*, 28 Nov. 1828, and 15 Nov. 1832, *supra*, p. 350.

(*c*) *Cockburn* v. *Oxenford*, M. 9028 and 16294, and 1 Sup. 560, and 3 Sup. 214 (1676); *Scott* v. *Elies*, 1 Sup. 644, and 2 Sup. 600 (1671); *Kyle* v. *Allan*, 23 Nov. 1832, 11 S. 87.

(*d*) Dig. iv. 4, 18, 5; Dig. iv. 4, 3, 9; Stair i. 6, 44, 11th sentence; Bankt. i. 7, 96; Ersk. i. 7, 42; 1 Bell's Com. 134–5. *Hamilton* v. *Sharp*, M. 8981 (1630); *Vernock* v. *Hamilton*, M. 2214 (1637); *Forbes* v. *Earl Marischall*, M. 10323 (1669); *Straiton* v. *Wight*, M. 10326 (1698).

(*e*) *Hamilton* v. *Sharp*, *supra*; *Seton* v. *Seton*, M. 9006, Elch. *v.* Service of Heirs 5 (1749); *Carnegie* v. *Cranburn*, M. 8991 and 7732 (1663).

(*f*) Explained in chap. ii. of this Part, *infra*.

(*g*) Stair i. 6, 44, paragraph 11.

(*h*) M'Ken. Inst. i. 7, 12; also Bankt. i. 7, 96; Ersk. i. 7, 42; Opinion of Fountainhall, 2 Sup. 611.

(*i*) Dig. iv. 1, 6; Dig. iv. 4, 18, *sect. ult.*; and iv. 4, 3, 9.

one which was pronounced only seven years after the Act 1621, c. 6, relative to apprisings, had been passed, and no argument is deduced from the analogy of that statute in support of the judgment of the Court; but, on the contrary, it is expressly said to have been pronounced on the authority of the Roman law (*a*).

Following the Roman law, therefore, the rules on this subject seem to be these. If the person lesed should die, and be succeeded by another, the rules are different, according as the deceasing or the succeeding party were major or minor. 1. If the deceasing party were a minor at the time of his death, and the successor a major, the latter would be entitled only to the *quadriennium utile* which remained intact to the ancestor (*b*). 2. If the party lesed had passed his majority when he died, and was running his *quadriennium utile*, the major successor would only be allowed the period, however short, of the *quadriennium utile* not run at his ancestor's decease (*c*). Bankton (*d*) seems to think that he would at least be allowed a year if such a period did not remain of the *quadriennium utile*. But this doctrine has no foundation in the civil law, and has been borrowed from the rules relative to the redemption of apprisings, which he himself, in common with all other lawyers except Stair, holds to be inapplicable to this case. 3. If the successor, though a major, had not attained the age of twenty-five, and so had not run out his *quadriennium utile*, this would create no change upon the foregoing rules; he could not, for example, in the case where less of the ancestor's *quadriennium utile* had to run than of his own, plead that he was entitled to the whole period still to run of his own, and that his privilege of *restitutio in integrum* as regards his ancestor's deeds did not expire with the *quadriennium utile* of the latter (*e*). 4. Where, again, the heir is a minor, and the predecessor a minor also, the former is entitled in his own right, and not merely as successor to the defunct, to the whole period of his own minority yet to run, and to the *quadriennium utile* thereafter; but should the

(*a*) *M'Math* v. *Broughton*, M. 9040, 1 Sup. 155 (1628); Spottiswoode's Practicks, p. 300; and Wall. 390.

(*b*) Ersk. i. 7, 42; M'Ken. i. 7, 12; *dict.* of Fount. 2 Sup. 611; *Hamilton* v. *Sharp* (1630), M. 8981.

(*c*) Dig. iv. 4, 19; Ersk. i. 7, 42; M'Ken. i. 7, 12.

(*d*) i. 7, 96, *in fin.*

(*e*) *Ballantyne* v. *King*, 1 Sup. 254 (1628); Ersk. i. 7, 42; *dict.* of Fount. 2 Sup. 611; *M'Math* v. *Broughton*, M. 9040, 1 Sup. 155 (1628).

period of the defunct's minority unrun be greater than his own, he cannot claim any extension in consequence (*a*). 5. Where the heir is a minor, and the predecessor a major running his *quadriennium utile*, the former is allowed the whole period unrun of his own minority, and so much of the *quadriennium utile* as remained at the defunct's death (*b*).

These rules, reduced to a principle, come to this, that what is due to minority itself a minor successor is allowed to claim as in his own right, without respect to his predecessor's minority, which a major successor cannot claim at all; but whatever privilege is indulged by law to majors, a minor successor can only claim in right of his predecessor.

Minor's creditors and assignees may claim *restitutio*.

The privilege is also competent to the minor's voluntary and legal assignees or creditors (*c*), contrary to the opinion of Bankton (*d*). In the case where the creditors of a minor, or of a minor's heir, insist on the privilege, it would appear that they are entitled to institute their action of reduction, without being obliged, in the first place, to adjudge the minor's privilege, or otherwise to vest it in them by any process of legal attachment (*e*).

A major and minor engaged in the same transaction with the same interest.

If a minor is proprietor of a subject in common with a major, which they sell, and the minor afterwards seeks to be restored against the sale on the head of minority and lesion, is this competent in so far as regards his own share; and if so, has the major the like privilege? The Roman lawyers held that the minor was entitled to restitution as to his own share, but that the major had no privilege of this kind. Still, however, as the purchaser bought a whole, he was not bound to keep a half after the other moiety had been taken from him, and therefore he might insist on the major taking back his half also (*f*). This rule has been adopted in our law (*g*).

(*a*) Julii Pauli Recept. Sent. i. 9, 4; Dig. iv. 4, 19; Code ii. 53, 5, 1; Ersk. *ibid.*; Bankt. i. 7, 96; M'Ken. i. 7, 12.

(*b*) Dig. iv. 4, 19; Code ii. 53, 5, 2; Ersk. i. 7, 42; *M'Math* v. *Broughton*, *ut supra*.

(*c*) Stair i. 6, 44, par. 11. *Bargenie* v. *his Sons*, M. 10418 (1623); *Dunbar* v. *Leslie*, M. 5392, 10419, 8919 (1628): *Hamilton* v. *Sharp*, M. 10419, 8981 (1630); *Harkness* v. *Graham*, 20 June 1833, 11 S. 760. 1 Bell's Com. 135.

(*d*) Bankt. i. 7, 100.

(*e*) See *Salton* v. *Park*, M. 10420 (1666); *Balmerino* v. *Couper*, 2 Sup. 445, M. 10421 (1669); *Harkness* v. *Graham*, 20 June 1833, 11 S. 760.

(*f*) Dig. iv. 4, 47, 1; Code ii. 26, 1; Dig. iv. 4, 29, 1; Dig. xviii. 2, 13, 1.

(*g*) Bankt. i. 7, 99.

In what cases restitution is granted. What is lesion?

II. The object of the law being to throw around minors its protection, and to redress them when in reality wronged, we have adopted the rule of the Roman law, by which this extraordinary remedy is only applied when the injury is great; or, as it has been termed in Scotch law language, where the *lesion* is *enorm. De minimis non curat Prætor.* Reference must be had, in judging of the question whether there is lesion, to the circumstances and character of the parties; to the quality of the fact of which complaint is made; to the causes and consequences of the lesion, and to other circumstances of that description; because if the law were rigidly pushed in favour of minors, it would have the effect of excluding them from all commerce with the rest of the world (*a*). The rule, that the lesion must be enorm to justify restitution, appears to have been the nearly unanimous opinion of all the Roman lawyers (*b*), and is certainly the rule of the law of Scotland (*c*). 'If it be inconsiderable,' says Erskine, 'restitution is excluded; for actions of reduction are extraordinary remedies, not to be applied but on great and urgent occasions.' 'It is not consistent,' said Lord Gardenston, 'with the dignity of a supreme court of justice to canvass the expenditure of sixpences and shillings' (*d*). The deed, however, will be set aside if the lesion be enorm, although the person dealing with the minor offer to sustain the loss of that part which is considered excessive (*e*). As a general rule, lesion less flagrant, and supported by more slender evidence, will be received when a minor has no curators, or where the transaction relates to land, or where ready money is put into the power of a youth under age. But there will be much greater difficulty in the reduction where tutors or curators have authorized the transaction, or where previous judicial sanction has been given (*f*).

It will be impossible, in stating the law on this subject, to men-

(*a*) Dig. iv. 4, 24, 1. Ne magno incommodo hujus ætatis homines afficiantur, nemine cum his contrahente, et quodammodo commercio eis interdicetur.

(*b*) Dig. iv. 1, 4; Dig. iv. 4, 9, Pr.; Dig. iv. 4, 49; Voet. iv. 4, 11, 3; Warnkönig, Comment. vol. iii. p. 546; Lord Mackenzie, Roman Law, p. 141.

(*c*) Balfour, p. 179; Stair i. 6, 44, par. 4; Bankt. i. 7, 77; Dirl. and Stew. 289; Ersk. i. 7, 36. *Boswal* v. *Boswal*, 4 Sup. 513 (1701); *Heriot* v. *Blyth*, M. 8925 (1681).

(*d*) Hailes' Decisions, p. 911.

(*e*) Dig. iv. 4, 24, 4; Dig. iv. 4, 27, 1; Bankt. i. 7, 83.

(*f*) 1 Bell's Com. 136; Ersk. i. 7, 34, *in fin.*

tion every deed that may be competently set aside by a minor on the ground of lesion, as the list includes every deed by which, directly or indirectly, he is injured in his property. This general statement of the law will suffice with regard to all the more ordinary transactions, such as bills, bonds, contracts, and other personal obligations, from which, if to his injury, he is relieved. And it will only be necessary to refer particularly to some of those complicated transactions, where, from the hardships which restitution will impose on the party dealing with the minor, there appears to be more room for difference of opinion. The decisions on the subject comprehend all kinds of deeds,—sales of heritage or moveables, dispositions, judicial proceedings, contracts of all kinds, loans. An eminent civilian has thus generalized the law: 'The things against which a minor has restitution are three, viz. if he loses what he had, if he omitted what he might have acquired, if he undertook an obligation without any necessity' (*a*). Of the first kind are donations, sales, pledges, discharging an action, compromises, novations, and discharges of debt. Of the second kind are undue renunciations of profitable successions. Of the third are contracts of all kinds, entering upon a burdened succession, and *quasi* delicts (*b*).

Time for estimating lesion.

The lesion must be estimated as at the time the transaction was entered into, not of the institution of the action of reduction (*c*).

Deeds where lesion is not presumed. Personal obligation.

(1.) Where the minor or his tutor has granted a bill or bond or other personal obligation, he may be restored on proving lesion at the time it was granted, that is, that the debt incurred was not *in rem versum* of him; that it was a cautionary obligation, or that its object was to place money in his hands which he misspent; in short, that he was not benefited to the full value of the debt contracted (*d*). A minor sister, with consent of her father, granted a bond to her brother for £300, in consideration of trouble and

(*a*) Facta, adversus quæ restitutio in integrum minori coneeditur, tria sunt; si quod habuit amisit; si omisit quod acquirere potuit; si oneri non necessario se obligavit. Vinn. Partit. Juris. c. xliv., 1st sentence. In this Vinnius only followed Ulpian, Dig. iv. 4, 44.

(*b*) See Vinnius Notes, *ibid.*

(*c*) Vinn. Partit. Juris. c. xliv., notes and authorities there cited. *Infra*, in this chapter, No. III.

(*d*) *Anderson* v. *Cation*, 15 Nov. 1832, 11 S. 10; *M'Michael* v. *Barbour*, 17 Dec. 1840, 3 D. 279; *Dempster* v. *Potts*, 30 and 31 Dec. 1837, 15 S. 364, and 12 F. C. App. p. 25; *Harkness* v. *Graham*, 20 June 1833, 11 S. 760; *Dundas* v. *Allan*, M. 9034 (1711). See *infra*, p. 399.

expense incurred by him relative to an action in which she got decree for £900. The Court held that the bond was reducible on minority and lesion, reserving to the brother any claim he might have for trouble or expense (*a*). So a bill granted by a minor in satisfaction of his father's debt, was held liable to reduction on minority and lesion (*b*). A minor who has the choice, either as creditor or debtor, to take or to give any one of two things, will be relieved if he has made a bad choice (*c*).

Where the minor takes up an unprofitable succession.

Restitution is granted where a minor has taken up the succession of an ancestor which is burdened with debts greater than its value (*d*). The rule applicable to such cases as this is, that a minor taking up a succession must take it with all its qualities; and if burdened with debt, he must pay it, if it could have been made effectual against the ancestor. This holds although the obligations, had they been entered into by himself, might have been set aside on lesion. The predecessor having no right to sue for restitution, the minor is entitled to none (*e*).

But, on the other hand, wherever the minor is willing to renounce all benefit from the succession, the Court will restore him against liability for the debts which he incurred by his representation, whether the succession was taken up directly, by serving heir or confirming executor (*f*), or by incurring a passive title through vitious intromission, or by the stating peremptory defences in any action as heir or executor (*g*), or by allowing decreet to go out as lawfully charged to enter heir (*h*); and in this last case he may

(*a*) *Rose* v. *Rose*, 20 Nov. 1821, 1 S. 124.

(*b*) *M'Michael* v. *Barbour*, *ut sup.* See also *Dundas* v. *Allan*, *ut sup.*

(*c*) Dig. iv. 4, 7, 7.

(*d*) Dig. iv. 4, 7, 5; Dig. xxix. 2, 57, 1; Domat's Civil Law, vol. i. p. 532; Balf. p. 229, c. 19; Stair i. 6, 44; Bankt. i. 7, 87; Erak. i. 7, 38. *Aberdeen* v. *Gordon*, M. 9031 (1708).

(*e*) Privilegium successoris legitimum factum predecessoris non rescindit. Code ii. 51, 7; Wal. Prin. 386. *Forsyth* v. *Anderson*, M. 8920 (1631); *Sutherland* v. *Creditors*, M. 5265, Elch. *v.* Minor 12 (1749); *Anderson* v. *Geddes*, M. 9020 (1732).

(*f*) *Redheugh* v. *Redheugh*, M. 8999 (1562); *Ruthven* v. *Hope*, M. 9030 (1682); *Drummond* v. *Logan*, M. 8999 (1628); *Matheson* v. *Matheson*, 1 Sup. 186 (1631); *Tailors of Leith* v. *Dennistons*, M. 9001 (1687); Erak. i. 7, 38.

(*g*) *Farquhar* v. *Campbell*, M. 9023 (1630); *Murray* v. *Chalmers*, M. 9001 (1705); *Tailzifer* v. *Drummond*, M. 9000 (1631); *Anon.*, 3 Sup. 183 (1677); *Kerr* v. *Bremner* in its later stages, 5 March 1839, 1 D. 618, partly affirmed, partly reversed, 9 May 1842, 1 Bell's App. 280.

(*h*) *M'Dougall* v. *Kennedy*, M. 8999, 2699, 1 Sup. 243 (1628); *Tailzifer*, *ibid.*; *Murray* v. *Chalmers*, *ibid.*;

renounce the succession, although the creditor may not only have obtained decreet against him as lawfully charged, but have further adjudged the lands, and entered with the superior. The adjudication would, however, subsist as effectual to the creditor, though led against a party as entered heir, who by the subsequent renunciation is held in law never to have been entered to the succession (*a*). In a late case it was argued, that the authorities compelling a minor to restore the property to which he succeeded, when he asks for restitution, were decisions in which the *lawful* act of a guardian in serving the ward heir, or confirming him executor to his ancestor, or in fixing on him the passive title of *gestio pro hærede*, was held to have its lawful consequence of rendering him liable for the debt due by his ancestor, only to the effect of restitution of what he had actually received, and under reservation of his right of relief against the tutor or his cautioner. But this, it was argued, cannot apply to vitious intromission, for that is a delict, in the consequences of which no one can be involved who has not *consented* to it. Therefore, that a pupil was not only not universally liable as a vitious intromitter, but also that he was not bound to restore even though *lucratus*. But the Court repelled this plea, holding it to be clear that the pupil must restore all the property intromitted with, although he could not be made liable as a vitious intromitter (*b*). In the case of *Kerr*, the Court again held that a *minor pubes* could incur a universal liability through vitious intromission; and if he did not get himself relieved within the *quadriennium utile*, he was liable for all his ancestor's debts.

The lesion is clear when the succession is burdened with more debts than it is worth (*c*); but if the lesion arise not from the succession itself directly, but through it in consequence of the mismanagement of the minor's tutor, who had spent it all without liquidating the debt which burdened it, there is no restitution to the minor (*d*).

Guthrie v. *Hardrope*, M. 9000 (1633); *Baxter* v. *Maxwell*, 1 Sup. 762 (1676).

(*a*) *Guthrie* v. *Hardrope*, *supra*. See also *M'Dougall*, *Tailzifer*, and *Murray*, *supra*. See *Bannatyne* v. *Roome* (1664), 2 Sup. 362.

(*b*) *Kerr* v. *Bremner*, *supra*; *Farquhar* v. *Campbell*, M. 9023 (1630); *Ruthven* v. *Hope*, M. 9030 (1682); *Tailors of Leith* v. *Dennistons*, M. 9001 (1687); *Matheson* v. *Matheson*, 1 Sup. 186 (1631).

(*c*) Cases cited; and 1 Erak. i. 7, 38; Bankt. i. 7, 87.

(*d*) *Matheson* v. *Matheson*, 1 Sup. 186 (1631); *Tailors of Leith* v. *Den-*

If the minor has expressly undertaken to pay his ancestor's debts, and has in consequence granted bills or bonds therefor, he cannot refuse payment of them on the ground of minority and lesion, without first reducing his original obligation to pay his debts (*a*).

Cautionary obligation of minor's father.

Under this head may be placed one decision where the minors endeavoured, from the peculiarity of their ancestor's obligation, to get rid of it without being obliged to renounce the succession. The ancestor became cautioner for a party who failed; and the representatives of the ancestor, being pursued for acts of mal-administration which happened after the ancestor's death, they pleaded that they were pupils; that it was the duty of their tutors to have withdrawn their father's bond of cautionry, which a cautioner for a person in office or his heir may do when he thinks fit; and that against this omission they must be reponed on the head of minority and lesion. Since, however, the lesion here was not direct, but a lesion arising from the accidental and scarce to be expected bankruptcy of the principal, the Court repelled the minor's plea. Kilkerran remarks, that in a question with the tutor it might be doubtful how far he was not liable for this omission; but that in a question with third parties minors will not in many cases be reponed against their tutors' omission to the prejudice of a right acquired by third parties, even when their claim against the tutors would be sustained (*b*). In a subsequent very stringent case, the same law was applied with regard to a cautionary obligation by the minor's father. The bond not having been withdrawn at the father's death, the Court held it to have been, and continued to be, a debt of his, which transmitted against his minor children (*c*). This is a case, therefore, of *omission* in which there is no restitution. In this case the person who had been minor was held bound to restore all the property of his father which he had intromitted with after majority; but it would appear that he was not bound to do so, *quoad* payments for his education and maintenance prior to his majority, which were regarded as property *bona fide* consumed.

nistons, M. 9001 (1687); Ersk. i. 7, 36; Wall. Prin. 383.

(*a*) *Henderson* v. *Dryburgh*, M. 8992 (1684).

(*b*) *Erskine* v. *Erskine*, M. 9002 (1739).

(*c*) *Kerr* v. *Bremner*, 17 Dec. 1835, H. of L. 14 July 1837, 2 S. and M'L. 895; C. of S. 5 March 1839, 1 D. 618; H. of L. 9 May 1842, 1 Bell's App. 280.

Where property destroyed after minor takes up the succession.

If the cause of injury to the minor shall have happened after the succession has come into his person, he cannot seek restitution—such, for example, as by an accident of fire, or an inundation, or a shipwreck; and he cannot recover from the creditors of the ancestor the sums which he paid them on the faith of the lucrative succession, which has since been destroyed (*a*).

On the other hand, a minor who has renounced a lucrative succession will be allowed to retract his renunciation and take up the inheritance (*b*). In regard to testate succession, a minor may be restored against the renunciation of a legacy which would have been profitable to him (*c*), or against his acceptance of one which imposes on him heavy liabilities, or is charged with some disadvantageous condition (*d*).

Marriage contracts.

Although marriage itself cannot be set aside on the head of lesion, it has been long settled that marriage contracts, securing enormous and exorbitant provisions to either party, to the prejudice of the other—a minor—may, at the instance of the latter, or persons in his right, be reduced on the head of lesion (*e*). The provisions to the parties themselves will be regarded with more favour than any that may be secured to the friends of either. Thus a minor husband, who had become bound to give his wife the whole liferent of his means and conquest, and to pay 5000 merks to her father in case there were no children of the marriage, having raised a reduction of the contract on the head of lesion, the Court reduced it in so far as regarded the obligation to the father-in-law, but not as to the wife's provision, though it was alleged that the children, if there were any, would be prejudged by the wife's total liferent. The reason for repelling this plea was, that it was uncertain whether there would be children; and if there were, the mother would be liable in the aliment to them. In this case it appears to have been held, that lesion to the children of the marriage was lesion also to the minor husband (*f*).

(*a*) Dig. iv. 4, 11, 5; Bankt. i. 7, 77; Ersk. i. 7, 36; *Edgar* v. *Edgar*, M. 8986 (1614); *infra*, in this chapter, No. III.

(*b*) Domat's Civil Law, vol. i. p. 532.

(*c*) Dig. iv. 4, 7, 7.

(*d*) Domat, vol. i. p. 532, No. 10.

(*e*) Stair i. 6, 44, 7th sentence. Ersk. i. 7, 38; 1 Bell's Com. 636, and cases following. See *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265; *Arbuthnot* v. *Morison* (1716), M. 9487, H. of L., 1 Pat. Ap. 7.

(*f*) *Davidson* v. *Hamilton*, M. 8988 (1632).

Like all cases, as to what shall be held to constitute lesion, there can be laid down no general rule here. It has been said, that 'if there be a *casus arbitrarius* in law, this is one' (*a*); and the rule of the Roman lawyers is the only one—indefinite as it is—that can be applied: 'Ubi equitas evidens poscit, subveniendum est' (*b*). The Court, in general, will restrict the provision, and not annul the contract altogether (*c*). A lady having given a tocher worth £20,000 Scots, and only received as a provision the liferent of one-half of it, with ten chalders of victual yearly, the Court held that she had been enormly lesed, and so gave her the liferent of the entire sum, and the victual besides (*d*). A principle was sanctioned in one of the later cases, which, if applied generally, will not render this part of the law of *restitutio in integrum* a *casus arbitrarius*. The wife conveyed her lands to her husband and herself in conjunct fee and liferent, and to the children in fee, and did not exclude the *jus mariti*. She brought a reduction on the ground of minority and lesion, because, by the husband's insolvency at the time of marriage, she was reduced to want. But the Court refused to

(*a*) *Arg. Carmichael* v. *Castlehill*, M. 8993 (1698).

(*b*) Dig. iv. 1, 7.

(*c*) Stair i. 6, 44; *M'Gill* v. *Ruthven*, M. 5696 (1664).

(*d*) *M'Gill* v. *Ruthven*, *ibid.* In another case, a lady was restored against a contract where she had disponed lands to her husband and his heirs worth 300 merks yearly, with 2000 merks in money, and only received a liferent of 200 merks. On the husband's death, without heirs of the marriage, the destination in the contract carried the estate to strangers. —*Gordon* v. *Gordon*, M. 8992 (1669). So, the same decision was pronounced in a case where a lady had disponed away the fee of a tocher of 110,000 merks, without any clause of return of the whole or a part, in case the marriage dissolved, without children, by the husband's death, which event happened. The wife received nothing by the contract, but a liferent of lands not worth 7000 merks per annum, 'which was but the annual-rent of her own portion; so in effect she had nothing' from her husband; 'and many other inequalities in the terms and conditions of the contract were insisted on to evince her lesion.'—*Carmichael* v. *Castlehill*, M. 8993 (1698). A minor lady having married a bankrupt, to whom she disponed all her fortune, he becoming bound to pay her a jointure, his creditors shortly after marriage seized on his whole estate. The Court reduced the contract (as the jointure was but a name) in so far as concerned the disposition she had given of her own estate; only this did not take from the husband and his creditors the *jus mariti* to the rents of the lands, during the standing of the marriage, and until the husband's death.—*Byres* v. *Reid*, M. 8995 and 6045 (1708). A lady, in her marriage contract, had disponed to her husband her whole heritage, he becoming bound to provide a jointure to her, without, however, any

reduce, because the husband had not by the contract more than he would have had, *jure mariti*, at common law (*a*).

In other cases again, where the lesion is not enorm, of course there will be no reduction (*b*). It does not appear to have been fixed by any reported decision, that a minor husband is entitled to be restored against the obligation for his wife's debts, which he incurs by marriage. But the converse appears to be settled, that a minor wife cannot be restored against the legal assignation which the marriage operates of all her moveables to the husband in virtue of the *jus mariti* (*c*).

Breach of promise of marriage.

It has been decided in England, that an infant may sue an adult on a breach of promise of marriage, although the latter could not sue the former upon such a promise (*d*). Upon the same grounds, would minority, in our law, be a sufficient defence to an action of damages for breach of promise?

Leases.

A lease, granted to the minor's lesion, may be set aside. Where curators had let the minor's whole estate in one farm, the Court sustained the deed as a valid exercise of power, but the minor was allowed to prove lesion (*e*); and in another case, a married woman,

provision to her of the liferent of her own lands. The husband at the time was bankrupt, and shortly afterwards died. In a competition between the widow and his creditors, the Court reduced the contract, so as to give the former the liferent of the lands she brought with her; and thereafter decided the like as to the fee, unless the creditors would undertake to make out that the husband had a stock at the time of the contract, for securing the wife in a liferent, though afterwards his means failed.—*Chalmers* v. *Lyon's Creditors*, M. 8996 and 6058–9 (1710 and 1714). So, also, a discharge by a minor, without curators, of a part of the tocher stipulated in his contract of marriage, being granted privately before solemnization of the marriage, and without the concurrence of the friends, who were assisting him in the marriage treaty, was reduced at the instance of the granter, on the head of minority and lesion, and as being *contra fidem tabularum nuptialium*.—*Morrison* v. *Arbuthnot*, 1 Paton 7 (1728). See also *Taylor's Trs.* v. *Murison's Trs.*, 9 Feb. 1854, 16 D. 529, where a trust deed executed *intuitu matrimonii* by a young lady the day after she became of age was found to be revocable four days afterwards, and an antenuptial contract executed by her settling her property anew sustained.

(*a*) *Anderson* v. *Abercrombie*, 31 Jan. 1824, 2 S. 662; 1 Bell's Com. 134.

(*b*) *Sluman* v. *Ker*, M. 6117 (1635); *Young* v. *Robertson*, Hailes 265 (1769); *Montgomery* v. *Leven*, M. 8992, 3217, 5803 (1683); 1 Bell's Com. 636; *Boswell* v. *Boswell*, 4 Sup. 513, aff. Robertson, p. 346 (1701).

(*c*) *Anderson* v. *Abercrombie*, *ut supra*; *Byres* v. *Reid*, M. 8995 (1708).

(*d*) *Holt* v. *Ward Clarencieux*, 2 Stra. 937.

(*e*) *Monro* v. *Monro*, Elch. *v.* Minor 1 (1735).

under age, having granted leases with consent of her husband, the Court found her entitled to be restored on the ground of lesion (*a*).

Payment of debts.

Where a debt is justly due by a minor, he cannot seek restitution against payment. In one case it was even held, that where payment had been made by his administrator to a party who was not the true creditor, he could not in the circumstances plead *bona fide* payment against a demand by the true creditor (*b*). But when the obligation is of that kind, that it would not be the foundation of an action at law, although in natural justice it ought to be implemented, he will have restitution (*c*). It is doubtful if this will be the case if a prescribed account were paid (*d*). A minor granting bond for a debt will be restored against it if he had a defence that would have liberated him from payment (*e*).

Judicial proceedings.

There is no necessity for any peculiar restitution against a decree in absence, because, at common law, any one may be reponed against it within the period of the long prescription. With regard to decrees *in foro*, minors will be restored where the correct defences, in point of fact or of law, have been omitted to be stated, or where an action at their instance is dismissed from not having been properly supported; because these are omissions arising from the neglect or ignorance of himself or his guardians. But if the proper defences have been stated and repelled, or if the action at the minor's instance has been properly laid and correctly supported by all the statements of fact of importance to the issue, and all the pleas which could give these effect, reduction is incompetent; because the lesion arises from the error of the judge, to which the entire community are exposed. The matter is then *res judicata*, which *pro veritate accipitur*. Where, in short, the defence or the instance was *competent and omitted*, whether in point of fact (*f*) or

(*a*) *Gibson* v. *Scoon*, 6 June 1809, F. C.

(*b*) *Howes* v. *Campbell* (1758), M. 1799.

(*c*) Erak. i. 7, 38, read in connection with iii. 1, 4.

(*d*) Dig. iv. 4, 25; Bankt. i. 7, 87.

(*e*) *Watson* v. *Davidson*, 5 Sup. 167 (1738).

(*f*) Dirl. and Stew. p. 333; Erak. i. 7, 38. *Stuart* v. *Stuart*, M. 9008 (1638); *Lagie* v. *Ker*, M. 9018 (1699); *Gordon* v. *Queensberry*, M. 8235 (1680); *Cockburn* v. *Halyburton*, M. 9009 (1672); *Alexander* v. *Park*, M. 9016 (1697); *Kincardine* v. *Purves*, M. 9016 (1698). In regard to this case of *Kincardine*, the Lord Justice-Clerk (Hope) observed in the late case of *Craven* v. *Elibank's Trs.* (9 March 1854, 16 D. 822): 'The case of *Kincardine* is therefore not consistent with

of law (*a*), the minor may be restored against the decree; but not if it was proponed and repelled (*b*). Under the latter class of cases comes a reference to the adversary's oath, which, though an error to have made it, is of such a nature that the Court will not allow the minor to open up the decree which followed on it, and allow him to prove against the oath (*c*).

Can minor be restored against plea of competent and omitted?

Even when the plea or statement of fact is competent and omitted, the Court will not in every case allow reduction, if by the loss of evidence since the decree had been obtained, caused through the lapse of many years, the party holding it would be shut out from establishing the verity of his claim. Thus, if the decree had been obtained when the minor was one or two years of age, and the reduction is intented twenty years afterwards, when all evidence of the creditor's right has perished, it would be a hard case to allow the reduction, seeing that the creditor having obtained his decree *in foro*, could have no suspicion of the necessity for still preserving the grounds and warrants of his right (*d*).

This was one of the points argued in the important case of *Shedden* v. *Patrick*. During the minority of the pursuer of that action of reduction, proceedings had been carried through in regard to the succession to a landed property belonging at the time of his death to his father, in which it had been determined by the Court of Session and the House of Lords that the present pursuer was illegitimate. A factor *loco tutoris* had been appointed to the pupil, by whom the litigation was conducted on his behalf, and the whole proceedings were *ex facie* formal and regular. No plea was however founded on the domicile of the present pursuer's father having

itself, or with the law as held at that date, if the decree was taken as one *in foro*, seeing that the minor was reponed against it, to the effect of being allowed to state all defences omitted either *in facto* or *in jure*. So far as one can collect, the judgment did not proceed on any distinct ground; and it must be presumed that the decree was not taken to be *in foro*, in the proper sense of the term, else that result could not have followed.'

(*a*) *Seton* v. *Kelly*, 1 Sup. 511 (1665); *Hartshaw* v. *Hartwoodburn*, M. 9009 (1666); *Purves*, *supra*, p. 403 (*f*), and 4 Sup. 307 (1696); *Watson* v. *Davidson*, 5 Sup. 167 (1738).

(*b*) Reg. Maj. i. 13, 3; Quon. Attach. c. 82; Dirl. and Stew. p. 333; Bankt. i. 7, 89; Ersk. i. 7, 38. *Annandale* v. *Johnstone*, M. 9011 (1679); *Kincardine* v. *Purves*, *supra*; *Anderson* v. *Geddes*, M. 9020 (1732).

(*c*) *Cuby* v. *Cubies*, M. 9017 (1699).

(*d*) *Oakley* v. *Telfer*, M. 9019 (1705).

been Scotch at the date of the marriage, by which he claimed to have been legitimated, and the action of reduction was grounded upon strong allegations of fraudulent concealment of this fact, on the part not only of the other litigants, but also of the factor *loco tutoris* appointed to attend to the pupil's interests. In reference to this last, Lord Fullerton, in delivering the judgment of the Court, observed: 'It is not wonderful that the pursuer took this course, because, if Hugh Crawford (the factor *loco tutoris*) acted fairly, and *bona fide* brought the interests of the pursuer under the cognizance of the Court of Session and the House of Lords, it would be difficult indeed to see how the final and conclusive effect of that judgment could be impeached by the alleged concealment imputed to the litigants whom the factor was opposing.' And again: 'It may be, and is quite competent for the minor or pupil if really injured, to challenge the fairness of the proceedings taken by the officer of Court appointed to watch over his interests, and to show that those interests have been fraudulently sacrificed. But surely it requires the clearest statement of the nature of that injury to warrant such an action. And the security generally supposed to be afforded by such a course would be absolutely worthless, if it were enough for the party to bring his action, charging the officer of Court with fraudulent collusion, without calling him into Court at all; and that twenty years after his death, and the death of nearly all the parties who can be supposed to possess any information on the subject. I cannot conceive anything more hazardous to the legitimate interests of all parties forced into litigations with pupils or minors than a course of this kind, exemplified as it is in the circumstances of this very case. Here the allegation is the collusion or fraudulent concert of a factor *loco tutoris*. The principle would be the same, if the original action of reduction on the part of the pursuer had been conducted by a testamentary tutor or a tutor-at-law; and the practical result would be, that in all cases of the kind, the party would be enabled to obtain a review of the judgment against him at any given time, by the very simple device of averring that his nominal guardian had been in collusion with the opposite party, and that without the slightest specification of any one fact in that guardian's conduct from which such concert or collusion could be inferred.' The

decision of the House of Lords upon appeal proceeded on other grounds (*a*).

If decree has gone against a minor by default, by his not obtempering the orders of the Court to lodge papers in due time, or by his allowing the reclaiming days to expire, he cannot be reponed against the omission on the head of minority and lesion (*b*).

Minors are only restored to their defences, which were competent and omitted against themselves, where their interest is direct, but not where the process is against a third party, though such a process may affect their interest, 'because this would tend to make pleas endless' (*c*). Where a minor is restored against a decree, the whole decree is not opened up. It is only those findings where the minor was lesed, against which he is restored (*d*). A decree pronounced by an incompetent court may be set aside, even after the *quadriennium utile* has expired (*e*).

Submissions.

Against a submission entered into by minors, or tutors, or curators, restitution is granted, if it can be shown that the subject was an improper one for reference, was unskilfully conducted, by the omission of the statement of some valid plea, or that the arbiters were unfit for the office (*f*). Restitution will in this case, however, be granted only where the lesion is flagrant (*g*); but the authorities do not support the doctrine of Professor More, that there is no restitution at all (*h*).

Omissions.

The principle of the law of *restitutio in integrum* applies to all cases where the minor has suffered wrong; and consequently he will have redress against injury sustained from having been prevented acquiring property, as much as from having been injured in any transaction into which he had actually entered. *Placuit minoribus etiam in his succurri quæ non acquisierunt* (*i*). There

(*a*) *Shedden* v. *Patrick*, 11 March 1852, 14 D. 735; H. of L., May 1854, 1 Macq. 535.

(*b*) *Newton* v. *Paip*, M. 9012 (1683); *Badenoch* v. *Kelmans*, Hailes 276 (1769).

(*c*) *Anderson* v. *Geddes*, M. 9020 (1732).

(*d*) Bankt. i. 7, 89.

(*e*) *Rankine* v. *Rankine*, 31 May 1821, F. C., and 1 S. 43.

(*f*) Dig. iv. 4, 34, 1; Spot. Pract. 301. *Williamson* v. *Fraser*, M. 8965 and 665 (1739). Montgomerie Bell, p. 99, sec. 175. *Supra*, p. 244.

(*g*) Bankt. i. 7, 93. *Williamson* v. *Fraser*, *ut supra*.

(*h*) More's Notes, p. xlvi.; Lectures, i. p. 113.

(*i*) Dig. xxii. 1, 17, 3; Dig. iv. 4, 7, 6; Dig. iv. 4, 44; Code ii. 40, 1 and 2.

are, however, omissions against which minors have no redress; such, for example, as a cautionary obligation undertaken by the minor's father, from which himself or his guardians have neglected to get relieved (*a*).

Deeds where lesion is presumed.

(2.) In the cases hitherto considered, the presumption of law is in favour of the deed, and it lies upon the minor challenging it to show that it is open to objection. But there is another class of deeds, where the presumption is against the party founding on them, where lesion is presumed, and where it must be instructed, therefore, that they are to the minor's advantage. In all cases of this kind, it is competent to the minor to state the objection by way of exception as well as by reduction (*b*); or he may suspend a charge of payment (*c*).

Donations and cautionary obligations.

Donations and cautionary obligations are deeds, in regard to which there is no necessity for any presumption of law to establish lesion; and that they are of this tendency, the law holds so strongly, that the contrary cannot be established by proof. Restitution, therefore, will at once be granted against such deeds (*d*). A cautioner in a suspension was minor, but was attested as sufficient. The attestor knew that he was minor, and the Court, while they freed the cautioner, found the attestor liable (*e*). With regard to donations, the rule must be understood in a reasonable manner: for if the minor were to grant insignificant presents to his near relations, the Court would not afterwards order them to be restored; and small provisions to his brothers and sisters have been sustained (*f*); but a tutor has no power to grant provisions of this sort (*g*). The donation may be direct or indirect. Of the latter kind would be an acknowledgment for money never received, or

(*a*) *Supra*, p. 399.

(*b*) See *Harkness* v. *Graham*, 20 June 1833, 11 S. 760; *Crawford* v. *Bennet*, 19 June 1827, 2 W. S. 608.

(*c*) *Nimmo* v. *Murray*, 2 Sup. 431 (1667); *Blantyre* v. *Walkinshaw*, M. 8991 (1667); *Scoffier* v. *Read*, M. 8936 (1783).

(*d*) Stair i. 6, 44, 10th par.; Wall. 381–3; 1 Bell's Com. 135. *Seton* v. *Kelly*, 1 Sup. 511 (1665); *M'Kenzie* v. *Fairholm*, M. 8982, 8959, 16278, 1 Sup. 530 (1666); *Dundas* v. *Allan*, M. 9034 (1711); *Rogers* v. *Baird*, M. 9029 (1681); *Wall* v. *Brownlee*, M. 9035 (1724); *Lindsay* v. *Ewing*, M. 8997 (1770); *Scoffier* v. *Read*, M. 8936 (1783); *Sutherland* v. *Morson*, 19 Jan. 1825, 3 S. 449; Bell's Prin. 2101.

(*e*) *Kinghorn* v. *Cleland* (1672), M. 2075; *Drummond* v. *Cunninghamhead* (1624), M. 3465.

(*f*) *Heriot* v. *Blyth*, M. 8925 (1681).

(*g*) *Supra*, p. 245 (*c*).

the discharge of a debt never paid; and against such deeds there will be restitution (*a*). Thus, where a minor, not obtaining ready payment from the debtor of the annual-rents upon an heritable bond, granted him a discharge thereof, and took his moveable bond for the same, bearing interest, the Court sustained a reduction brought on the head of lesion, the minor having granted a discharge of the heritable bond, and not taken as he should have done a personal bond of corroboration for the annual-rents (*b*). And a discharge by a minor of part of the tocher stipulated in his contract of marriage, granted privately and without the knowledge of the friends who were acting with him, was reduced at the instance of the granter on the head of minority and lesion, and as *contra fidem tabularum nuptialium* (*c*).

Money borrowed.

In all cases of money borrowed by tutors, or by minors even with curators, lesion is presumed; and in order to give validity to a deed granted for the loan, it is incumbent on the lender to prove that the money actually paid down to the minor, to his tutors or his curators, has been expended *de in rem verso* of him; has been employed in paying off debts, in improving his estate, in educating or maintaining him; in buying a stock and setting him up in business; or in some other mode beneficial to the minor. To establish this, is a condition precedent of the demand for payment; and if it appear that the money had been squandered by the minor, or embezzled by his tutors or curators, the bond will be reduced (*d*). The creditor must look after the money while in the possession of the borrower or his guardians; he is entitled to require evidence of the money being *in rem versum*, and may raise action to have the money repaid, or to have evidence produced of the money being so applied (*e*). *Curiosus debet esse creditor quo vertator* (*f*). Bankton

(*a*) *Lockhart* v. *Lockhart*, M. 8958 (1626); *Seaton* v. *Hepburn*, M. 8959 (1633).

(*b*) *Moncrieff* v. *Mitchell* (1729), M. 8996.

(*c*) *Morrison* v. *Arbuthnot* (1716), M. 9487; H. of L. 1728, 1 Pat. App. 7.

(*d*) Dig. iv. 4, 7, 1; Dig. iv. 4, 27, 1; Stair i. 6, 44, sentence 10; Bankt. i. 7, 83; Ersk. i. 7, 37. *Blantyre* v. *Walkinshaw*, M. 8991 and 2215 (1667); *Scoffier* v. *Read*, M. 8936 (1783); *Nimmo* v. *Murray*, 2 Sup. 431 (1667); *Harkness* v. *Graham*, 20 June 1833, 11 S. 760. See *Ferguson* v. *Yuill*, 10 June 1835, 13 S. 886; *Morton* v. *Muirhead*, M. 8931 (1749); *Dempster* v. *Potts*, 30 and 31 Dec. 1836, Jury Sittings, F. C., and 15 S. 364. Bell's Prin. 2101; 1 Bell's Com. 135.

(*e*) *Ferguson* v. *Yuill*, *supra*.

(*f*) Dig. xv. 3, 3, 9 *in fin.*

lays down a doctrine which is contrary to this. 'If the tutor or curator,' he says, 'charge himself with the money borrowed, in his accounts, the minor cannot refuse payment of the bond, because it thence appears that it was *in rem versum*, or turned to his account' (*a*). Although the tutor put down this as a charge against himself, he may notwithstanding have squandered the money; and even the authorities to which Bankton refers (*b*) sanction an exactly opposite rule, namely, that although the tutor should in the most express terms admit that he received the money, it is notwithstanding incumbent on the creditor to show that it was beneficially expended for the minor, otherwise he cannot sue upon his bond. For this doctrine there is a train of authority (*c*), and even the express opinion of Bankton himself (*d*). The only mode whereby a person can keep himself secure in lending money to a minor or tutor, is by stipulating that he shall himself be allowed to apply the money for the minor's behoof, or that the latter shall produce evidence that it has been properly applied, within a certain time, otherwise to pay back the loan (*e*).

Sales of heritage and assignations.

The same rule is applied to sales of the minor's heritage (*f*), and to assignations of his personal rights (*g*). The purchaser must, before he can maintain the subject or right purchased, show that the price had been applied to the minor's use; and restitution will be given although the minor may be unable to refund the price, which himself or his tutor has squandered. A minor may be restored against a sale of his heritage, though carried through under the sanction of the Court (*h*).

How restitution is barred.

III. The deeds against which the minor may have redress have been shown to be those where the injury arises from his minority

(*a*) Bankt. i. 7, 76.

(*b*) *Blantyre* v. *Walkinshaw*, M. 2215 (1667). Code ii. 25.

(*c*) Dig. iv. 4, 7, 1; Dig. iv. 4, 27, 1; Stair i. 6, 44, par. 10; Ersk. i. 7, 37; Bell's Prin. 2101. Arg. in *Jack* v. *Halyburton*, M. 9003 (1743); *Vernock* v. *Hamilton*, M. 9047, 2214 (1637); *Morton* v. *Muirhead*, M. 8931 (1749); *Harkness* v. *Graham*, *supra*; *Dempster* v. *Potts*, *supra*; *Blairs* v. *Mitchell* (1802), M. 16388.

(*d*) Bankt. i. 7, 83 *ad fin.*

(*e*) *Ferguson* v. *Yuill*, *supra*.

(*f*) Bankt. i. 7, 83; Dig. iv. 4, 24, 4; Dig. iv. 4, 47 *ult.* *Thomson* v. *Stevenson*, M. 8991 (1666); *per* Lord Balgray in *Harkness* v. *Graham*, 20 June 1833, 11 S. 760; *Houston* v. *Maxwell*, M. 8986 (1631); *Barnbugil* v. *Hamilton*, M. 8915 (1567).

(*g*) *Ruthven* v. *Gray*, M. 31 (1672); *Houston* v. *Maxwell*, *supra*.

(*h*) See *infra*, Part V. *in fin.*

Where the injury does not arise from the transaction itself, but flows *ex accidente.*

and weakness. But if the lesion were the consequence of some transaction between third parties, with which the minor had no concern further than being prejudicially affected by the proceeding *ex accidente* (*a*), or if it happened through some *damnum fatale*, it is a lesion for which there is no restitution granted against the person dealing with the minor. If healthy cattle were purchased, and in the minor's possession contracted disease and died, there is no rescission of the sale (*b*). Goods fairly bought being lost by shipwreck, or a house purchased accidentally burnt, are illustrations of the principle (*c*).

Where matters cannot be restored.

The only grounds of divorce known in the law of Scotland are adultery and desertion. After a marriage has been once validly contracted, it will form no good ground for reducing it, that it is greatly to the lesion of a minor spouse, and that he might have obtained a more suitable wife (*d*). It has been expressly found that a minor who was 'circumvented' in entering into a marriage with the bastard daughter of the Earl of Rothes, was bound by the contract (*e*). It would, however, be different if there were fraud in the mode in which the consent to marriage was obtained; but in this case redress would be given not on the principle of *restitutio in integrum*, but on the ground that no valid contract was entered into (*f*).

Where the party dealing with the minor is compelled to grant the deed.

It would be a hard case for the minor himself if he could not compel payment of debts justly due to him, without laying every one with whom he deals under the inconvenience of being obliged to take precautions against after challenge. Accordingly the payment of ordinary personal debts, rents, dividends, interests, is a transaction against which the law will not give restitution, whether it be made to a tutor or a minor, unless in the case where the debtor acts fraudulently in the matter (*g*). And the payment would be sustained, although the tutor or curator squandered the

(*a*) *Carnegie* v. *Cranbourne*, M. 8991 and 7732 (1663); *Anderson* v. *Geddes*, M. 9020 (1732). 1 Bell's Com. 136.

(*b*) Dig. iv. 4, 11, 4.

(*c*) Stair i. 6, 44, 4th sentence; Bankt. i. 7, 77; Ersk. i. 7, 36. *Edgar* v. *Edgar*, M. 8986 (1614). More's Notes, p. xlvi.; 1 Bell's Com. 136.

(*d*) Bankt. i. 7, 79; Ersk. i. 7, 38; Heinec. Pan. Pars 1, No. 502. *Davidson* v. *Hamilton*, M. 8988 (1632).

(*e*) Fraser, Pers. and Dom. Rel. vol. i. p. 231, note.

(*f*) Fraser, Pers. and Dom. Rel. vol. i. p. 234.

(*g*) Bankt. i. 7, 84; Ersk. i. 7, 36; Vinn. Partit. Juris. c. xlv. p. 406. *Supra*, p. 229 *seq.*

money he had so received; the minor's only redress being an action of damages against the guardians (*a*). The case of heritable bonds presents a question in regard to which there is a difference of opinion. Where a minor has no curators, it is doubtful whether he may uplift an heritable bond, and grant the debtor a discharge that will bar after challenge (*b*). A tutor may validly uplift such a debt, or a minor with curators; and there is no reported decision finding that the minor can be restored against their discharge (*c*). In all cases where a minor has curators, the payment ought to be made with their knowledge and concurrence (*d*); otherwise the law will presume lesion, and the deed will be reduced, unless *de in rem verso* be proved (*e*). Where a minor agrees to a discharge, by novation or delegation of his right, he will be restored against the transaction if it be to his lesion. He could reduce a transaction, whereby he accepted a personal obligation for an heritable security (*f*).

Where the minor is engaged in trade, or as factor or agent.

In order to enable minors to obtain a means of livelihood, and to prevent the privilege granted them from standing in the way of their own advantage, the law as to *restitutio in integrum* is considerably modified when they are engaged in trade or in professional pursuits. Here their deeds are as unchallengeable as those of persons of full age for the reasons now assigned, and because, according to Stair, 'trading merchants, and others exercising trade, requiring peculiar skill, capacity, and understanding, are held rather to design to deceive than to be deceived' (*g*). It has been held that a minor is not liable to another partner of the same company for a company debt. The minor, aged fourteen, had been made a partner by his father of a joint-stock company. On its bankruptcy, a claim was made against the minor for payment of a debt alleged to be due to another company. It was held in the Court of Session, that in a question with the public the minor was liable in payment of all

(*a*) Ersk. i. 7, 36; Wal. 383. *Tailors of Leith* v. *Dennistons*, M. 9001 (1687).

(*b*) See this question considered, *supra*, p. 337.

(*c*) See Wall. Prin. p. 380, and the cases referred to, *supra*, p. 229.

(*d*) *Supra*, p. 387.

(*e*) *Supra*, p. 387; Vinn. Part. Juris. c. xlv. p. 405; Code ii. 33; Ersk. i. 7, 37; *Hume* v. *Fish*, 1 Sup. 94 (1636).

(*f*) Dig. iv. 4, 27, 3. *Moncrieff* v. *Mitchell*, M. 8996 (1729).

(*g*) Stair i. 6, 44, 4th sentence; Ersk. i. 7, 38; 1 Bell's Com. 135; *Blythman* v. *Murray*, 1 Sup. 405 (1649).

debts, and decree was given against him; but the House of Lords reversed the judgment, on the ground that the advances of which payment was claimed were not truly made by the company, but by an individual who was a partner of the same joint-stock company with the minor (*a*).

Bills and obligations by minors engaged in trade.

Bills or other obligations granted by minors engaged in trade for the goods in which they deal, cannot be set aside on minority and lesion; and the creditor is not bound to show that the minor advantageously disposed of the goods he so obtained. The presumption, moreover, is, that the deed was granted for a business transaction. 'A bill being challenged as granted in minority, the Lords found it relevant to sustain the bill, that the acceptor was bred a wright, and was trading at the time of accepting it. For drawing and accepting bills is of itself a branch of trade. The money must be presumed advanced *in artis suæ vel mercaturæ exercitio.* If this presumption be not sustained, a minor merchant cannot deal otherwise than by ready money, which in effect is saying, a minor cannot be a merchant' (*b*).

There are many illustrations in the decisions of this rule. A minor, engaged as a factor or agent, is liable, like any other acting in that capacity (*c*); and a minor engaged as a sheriff-clerk-substitute was held liable to the sheriff-clerk for the erroneous application of money in the discharge of his office, although there were peculiar reasons for freeing him from liability (*d*); and, in like manner, a minor engaged as a writer would be liable in damages for blunders committed by him (*e*). As a minor engaged in trade may have occasion to borrow money, the presumption of law that he was lesed by the transaction is here reversed, and he is held bound to prove lesion (*f*).

Obligations must be within line of minor's business.

In order to be obligatory, however, the deed must be within the line of the minor's business, because the necessity which justifies a

(*a*) *Wilson* v. *Laidlaw*, 11 Feb. 1813, unreported; H. of L. 29 June 1816, 6 Pat. App. 222.

(*b*) *Craig* v. *Grant*, M. 9035 (1732). See also Ersk. i. 7, 38; *Stirling* v. *Gray*, 1 Sup. 687 (1673); *Galbraith* v. *Leslie*, M. 9027 (1676); *Lindsay* v. *Pearsone*, 1 Sup. 460 (1650); *Campbell* v. *Turner*, 24 Jan. 1822, 1 S. 266.

(*c*) *Grieve* v. *Tait*, M. 9036 (1732).

(*d*) *Heddell* v. *Duncan*, 5 June 1810, F. C.; *supra*, p. 344.

(*e*) Bankt. i. 7, 78; *Galbraith* v. *Leslie*, M. 9027 (1676).

(*f*) *Macdonald* v. ——, M. 9038 (1789).

reversal of the ordinary law does not extend to any other case. A cautionary obligation, therefore, though an act of charity or friendship, is not necessary to the conducting of business, and would be reduced (*a*). Where the deed is not granted within the minor's business, the creditor must prove that it was beneficial to the minor, and so bring it within another exception to the ordinary law. A minor in trade gave a receipt for £3000, but which was not a trade transaction. He was found liable by the Court of Session in repetition of the whole amount, though he alleged that he had not received £3000, but only certain items and orders, some of which had been paid and others not. The House of Lords reversed the judgment, and, without requiring reduction, ordered an inquiry as to the amount received, or what might, without the party's wilful default, have been received, in respect of the receipt (*b*). In like manner, a minor acting as agent for another, having granted a discharge for money he never received, was reponed on minority and lesion (*c*); and a minor living in family with his father, who was incapable of attending to business, having granted a bill in satisfaction of a debt due by his father, was found entitled to restitution, although he was managing his father's estate, and acting generally in his affairs (*d*).

Obligations by minor in reference to gambling transactions.

In like manner, a minor—a clerk in a merchant's office—having engaged in a series of gambling speculations in railway shares, was held not bound by his contract. Lord Ivory stated the law thus: 'The Lord Ordinary cannot hold this to be a case which at all falls within the protection of the rule, that "a minor who betakes himself to any business or profession, as trade, manufacture, law, etc., cannot be restored against deeds granted by him in relation to that employment" (Ersk. i. 7, 38). That rule, which is mainly grounded upon a consideration of the minor's own interest not to be excluded from any legitimate employment or other reasonable and ordinary means of procuring or contributing to his livelihood, can never be extended to a set of transactions which would seem to be more appropriately characterized as sheer gambling, and even that of a very extraordinary and desperate description. It was argued

(*a*) *Wall* v. *Brownlee*, M. 9035 (1724); *Dundas* v. *Allan*, M. 9034 (1711); Ersk. i. 7, 38.

(*b*) *Crawford* v. *Bennet*, 19 June 1827, 3 W. S. 608.

(*c*) *Rogers* v. *Baird*, M. 9029 (1681).

(*d*) *M'Michael* v. *Barbour*, 17 Dec. 1840, 3 D. 279.

that there was no room for this view of the case, inasmuch as the transactions were such as the Court must have recognised and given effect to, as an undoubted source of legal obligation, if taking place between parties who were major. But the same might have been said as to an extended and speculative purchase of lottery tickets in former days, when the authorized existence of state lotteries made such transactions lawful. The Lord Ordinary, however, has no idea that a party giving encouragement and credit to a minor for the price of lottery tickets could, when all was lost, have had upon this ground a good answer to the minor's plea of restitution. In truth, the cases in which a minor may lawfully contract so as to bind himself, to the exclusion of his right to be restored in case of loss, are all of them exceptional cases, and as such opposed to the general rule by which the law throws the mantle of its protection over a party whom it presumes unable fully to protect himself. Accordingly, where a party lends money to a minor, the law, in favour to the minor, presumes *lesion*, unless the lender shall prove the advance to have been *in rem versum*. Now, would a lender at all satisfy this condition by proving that he had given his money to enable the minor to plunge into such irrational and extravagant transactions as have been established in the present case? Or would a curator or administrator, advancing the minor's own money to him for such a purpose, be entitled to credit for charges of such a nature in settling his accounts? The pursuers here stand in no more favourable position. They were cognizant of the whole nature, extent, and hazards of the minor's course of dealing. They saw the case in all its very worst features. In such circumstances it was a moral wrong to encourage him on, by affording him the facilities which they did. Instead of giving him credit, they ought at once to have refused all dealing with such a party. But having given him credit, and the transactions having resulted in loss, surely they have no reason to complain if they be now placed in no worse situation than that of a party who had lent his money to the minor, and was called on to prove *in rem versum*. The credit which they gave was in truth substantially equivalent to a loan. It is but too clear that the pursuers have no ground or pretence for maintaining their demand, on the footing of the action *de in rem verso*' (*a*).

(*a*) *Dennistoun* v. *Mudie*, 31 Jan. 1850, 12 D. 613.

Where a minor has entered into a contract with a third party, or has paid away money, against which he wishes to be restored, it would be a sufficient answer to a demand for restitution, that the contract had been beneficial for the minor (*a*). Illustrations of this general rule most frequently occur in those cases where the minor is guilty of extravagance in his mode of living, and incurs heavy accounts, against which he seeks redress. In such cases the rule is, to hold him bound on his contract (when the father is not the party primarily liable) for so much of the furnishings as appears to the judge suitable to his condition and circumstances, but for nothing more (*b*). Thus, an officer in the army, fifteen years of age, in a few months after he received his commission, ran in debt to a toyman in Edinburgh for furnishings, some of which might have been deemed altogether useless and frivolous, while the greater part consisted of articles which, although not absolutely necessary, are commonly possessed by young gentlemen of fashion and fortune. For this debt two bills were granted, and the minor refused to pay them. One of the judges, considering the practice of merchants taking bills from minors as highly improper and inexpedient, was for dismissing the action; another was for making a distinction between the furnishings which were altogether extravagant, and the rest; and all agreed, that contractions of this sort were incapable of producing actions against a father, upon his natural obligation to afford an aliment to his children. The majority, however, were of opinion, that in an action against the minor himself, and to the effect of attaching his proper estate, the circumstance of his enjoying a commission in the army was sufficient to justify advances such as the present (*c*). It may be gathered from the report of this case, that the minor had curators. The distinction taken in the above opinion between the liability of a father for his son's debts, and that of the son himself, does not appear to have been the turning-point of the case. The minor, according to the detailed report of Lord Hailes, was found liable

Where the deed is for the minor's benefit, or the money has been applied *de in rem verso* of him.

(*a*) *Thomson* v. *Stevenson*, M. 8982 (1666); *Houston* v. *Maxwell*, M. 8986 (1631); *Ruthven* v. *Gray*, M. 31 (1672); *Wemyss* v. *Creditors*, M. 9025 (1672); 1 Bell's Com. 134; *Dempster* v. *Potts*, 31 Dec. 1837, 15 S. 364.

(*b*) *Gray* v. *Purves*, 20 Dec. 1816, Hume, p. 411; Stair i. 6, 44, 9th paragraph.

(*c*) *Johnstone* v. *Maitland*, M. 9036, Hailes 911 (1782).

because the articles were *in rem versum* of him, with the exception of a few.

Obligations to tradesmen for necessaries.

There are other cases to the same effect, finding that where the articles furnished to the minor are suitable to his circumstances, decree will issue against him. Thus a bond by a minor for boots and shoes, when he was forisfamiliated, was sustained (*a*). And where an Irish student, residing in Edinburgh for his education, had obtained from a French tailor six coats, eleven vests, and eighteen pairs of breeches and pantaloons, in four months and a half, he was found liable by a majority of the Court for the bill; but 'Lord Meadowbank entirely disapproved of the interlocutor, which he thought went to alter an established rule of law, and to introduce an unwholesome precedent' (*b*). In another case, a minor, apprentice to a surgeon, who was entirely supported by his father, incurred within a short time a debt to a haberdasher of £50, for which, on the father's refusal to pay, the creditor sued the minor himself. But the Court found the latter liable only in the sum of £10, 11s. 2d., being all which they held to have been applied for the minor's use, and necessary and suitable for him (*c*). Where a minor, whose father is alive, has no property of his own, his father is the proper debtor for alimentary debts. The rules on this subject have been already stated (*d*).

Where minor's guardian is the creditor.

The minor's legal administrator may become his creditor, by advances made to him, applied *de in rem verso* (*e*); but of such transactions the law is extremely jealous, even with regard to fathers (*f*). In one case a minor had granted a bill to his father, while under apprenticeship in a town different from that where his father lived; and the father maintained that the son was thus forisfamiliated, more especially as he had married three days before granting the bill, but the Court repelled the plea (*g*). In another case, a curator having retired certain bills, alleged that they had been granted for the minor's board and education; and on the

(*a*) *Harpers* v. *Hamilton*, M. 8927 (1687); *Turnbull* v. *Richardson*, Elch. *v.* Minor 4 (1736).

(*b*) *Fontaine* v. *Forster*, Hume 409 (1808).

(*c*) *Scoffier* v. *Read*, M. 8936 (1783).

(*d*) *Supra*, p. 95.

(*e*) *Supra*, p. 292 *seq.*

(*f*) *Supra*, p. 292 *seq.*

(*g*) *Anderson* v. *Cation*, 15 Nov. 1832, 11 S. 10; *Duncanson* v. *Duncanson*, M. 8928 (1715).

ward's majority, having raised action against him for the sums so paid, the Court remitted to an accountant to take proof by writing or parole, as to whether the bills were for the purpose alleged. In this case it was held, that the expense of managing the minor's business was *de in rem verso* of him, for which he could therefore grant a valid obligation (*a*). In another case the Court held it a relevant defence against the reduction of a bond granted by a minor, that the money was applied to enable him to pass as a notary and messenger (*b*).

Money borrowed applied *in rem versum.*

Where the minor borrows money and pays his debts with it, or improves his estate, or buys property, the money is held to have been applied *de in rem verso.* The Court will judge of every case according to its own circumstances; and the matter may be sent to a jury (*c*), or remitted to an accountant to take proof by commission (*d*). A tutor in one case, having funds sufficient of the pupil's in his hands, borrowed money to pay for land he purchased. The pupil refused to recognise the transaction, *first,* Because the money was not applied *in rem versum* of him; and *secondly,* Because it was unprofitably borrowed, seeing that the tutor had money enough in his hands to pay the price. The Court were of opinion that it is not necessary for the lender to maintain that the tutor had no other money to answer the purpose for which it was lent; that is what the creditor has nothing to do with, it being enough for him to say, that the money lent was so applied; and these circumstances were found sufficient to show this: the narrative of the bond; the sale tallying in point of time with the bond; the party's admission that the price was paid; and the tutor's character for frugality (*e*).

Where there are doubts as to whether the transaction is for the minor's benefit, the rule is thus stated by Stair: 'Though there was some onerous cause of minor's deeds, yet unless it were *liquid,* by delivery of money, it is not receivable by way of exception or reply, but only is reserved to the creditor to pursue as accords; and the minor's deed found void notwithstanding. And this was

(*a*) *Stark* v. *Tennant*, 11 Feb. 1843, 5 D. 542.

(*b*) *Corsar* v. *Deans*, M. 8944 (1672).

(*c*) *Dempster* v. *Potts*, 30 and 31 Dec. 1837, 15 S. 364, 12 F. C. App. 25.

(*d*) *Stark* v. *Tennant*, 11 Feb. 1843, 5 D. 542.

(*e*) *Morton* v. *Muirhead*, M. 8931 (1749).

extended to necessary furnishing of clothes, taken on without consent of curators' (*a*). In a late case, this rule was followed. A minor sister had granted her brother a bond for a sum of money, as a reward for services in her behalf, which did not clearly appear. The Court reduced the bond, reserving to the brother any right of action he might have for labour done (*b*).

Fraudulent deeds by the minor.

There is no restitution to a minor when he has fraudulently induced another to contract with him; or has been guilty of fraud, after a fair contract has been entered into. The rule of the law is, *Errantibus non etiam fallentibus minoribus, publica jura subveniunt* (*c*); a rule also applied to married women, who in the general case are not liable on their personal obligations (*d*). A particular illustration of this rule is found in the case where the minor, in order to induce the other party to contract with him, affirmed and used means to show that he had attained majority, knowing that this was a false representation (*e*). In such a case there is no restitution for the minor (*f*).

The rule *Deceptis non decipientibus jura subveniunt* was applied in cases where the deceit arose, not so much from what the minor did say, as from what he did not say. A person within four months of majority lived at an inn for nearly three weeks while on a shooting excursion, and incurred a debt for his entertainment, which he refused to pay, on the ground of minority and lesion. But the defence was repelled. Lord Fullerton said: 'It is not pretended that, either at the time of contracting the debt or of granting the bill, the charger was *informed* of the suspender being under age. In these circumstances, the Lord Ordinary thinks that the plea of minority on the part of the suspender is truly a perversion of what was meant as a protection into an instrument of

(*a*) Stair i. 6, 33 *in fin.*; *Inglis* v. *Sharp*, M. 8941 (1631).

(*b*) *Rose* v. *Rose*, 20 Nov. 1821, 1 S. 154.

(*c*) Code ii. 43, 2; Dig. iv. 4, 9, 2; Stair i. 6, 44, 9th sentence; Bankt. i. 7, 91; Ersk. i. 7, 36; Vinn. Partit. Juris Civilis, c. xliv.

(*d*) Fraser, Pers. and Dom. Rel. vol. i. pp. 258–9.

(*e*) Code ii. 43, 2. The whole of this title of the Code is occupied with the discussion of this rule.

(*f*) Code *ibid.*; Code ii. 43, 3; Dig. iv. 4, 32; Bankt. i. 7, 80; Ersk. i. 7, 36; *Cranstoune* v. *Douglas*, 1 Sup. 422 (1649); *Wemyss* v. *Creditors*, M. 9025, 1 Sup. 367, 2 Sup. 611 (1637); *Borthwick* v. *Young* (1681), M. 12433; Domat's Civil Law, vol. i. p. 531, No. 7; 1 Bell's Com. 135.

fraud. The present seems exactly a case for the application of the principle, *Minoribus deceptis non decipientibus est subveniendum*' (*a*). This is in accordance with a prior decision, where a minor had ordered from a merchant mournings for his brother and sister, whom he was not bound to provide for. He resisted payment of the merchant's account, on the ground of minority and lesion. But the Court decreed against him, reserving his action for repayment against his brother and sister as accords; and this because he did not state for whom the articles were, and 'he appeared himself, by the habit of his body, to be of a man's growth, and if he was a minor he could not want much of twenty-one; neither did he signify to him his minority, and so *dolosé* by his silence induced him to trust him, *et non debet ex sua fraude lucrari*' (*b*). Another illustration of the positive fraud practised by the minor, in asserting what was false, is found in a case where the minor had entered into an indenture with consent of his elder brother, whom he falsely held out as his curator, although this was not the fact; and although the real curators had not consented, the indenture was sustained as a valid contract (*c*). Professor More has stated, that 'it has been said, that where minors have held themselves out to have arrived at majority, they cannot be restored against deeds to their prejudice; but the last mentioned case of *Sutherland* shows that this has been inaccurately laid down, and it is thought that such deceit on the part of minors would not now be held sufficient to deprive them of their legal remedies' (*d*). The case of *Sutherland* does not bear out this doctrine. There was no deceit there by the minor, as he believed himself to be in majority when he so asserted it (*e*). Under this class may be placed the case where a minor injures a thing borrowed or deposited with him. Here restitution is barred (*f*).

Exceptions to rule, that

To the general rule there are exceptions. The converse case of

(*a*) *Wilkie* v. *Dunlop*, 28 Feb. 1834, 12 S. 506.

(*b*) *M'Dougall* v. *Marshall*, M. 8995 and 421 (1705). See also *dictum* of Lord Moncreiff in *M'Michael* v. *Barbour*, 17 Dec. 1840, 3 D. 282.

(*c*) *Harvey* v. *M'Intyre*, 7 March 1829, 7 S. 561.

(*d*) More's Notes, p. xlvi.

(*e*) *Sutherland* v. *Morson*, 19 Jan. 1825, 3 S. 449.

(*f*) Dig. iv. 4, 9, 2; Dig. xvi. 1, 2, 3; Code ii. 43, 2; Stair i. 6, 44; Bankt. i. 7, 91; Erak. i. 7, 36.

fraudulent deeds bind minor.

that already stated, of a minor *majorrennitati proximus* incurring a debt to a person who was imposed upon by his appearance, requires the application of a different rule. If the minor's appearance indicate minority, the other party is not safe to contract with him, although he affirmed himself to be major, because in such circumstances there is in reality no deceit practised. Restitution against the deed would therefore be granted (*a*). In all cases of this kind, the contractor with the minor must show that he employed due diligence in ascertaining the minor's status, according to the rule, *Qui cum alio contrahit, vel est, vel debet esse, non ignarus conditionis ejus* (*b*). With stronger reason would the minor be entitled to restitution, if the other contractor, knowing his age, had induced him to assert in the deed that he had attained majority (*c*). A false assertion by a pupil that he had attained puberty, would not bind him to a contract which a *minor pubes* could enter into (*d*). If the minor, in stating himself to be major, did so *bona fide*, and in the belief that he was of that age, and had no intention to deceive the person dealing with him, the reason for denying restitution does not hold, and he is entitled to be restored *in integrum* against deeds executed to his hurt (*e*). Minority may be proved by exception in an action founded on a bond, even though, by calculation from the age stated at the time of the election of curators, the minor would be major at the date of signing the bond excepted from (*f*). The mode of proving that a minor fraudulently induced the other contractor to enter into the contract, is limited to writing or the minor's oath (*g*). The soundness of this rule has been doubted by Bankton, who holds, on the ground of the creditor's allegation resolving itself into fraud, that the minor's 'persuading the lender that he was major may be proved by the instrumentary witnesses, or even by extraneous ones, as deceit may be proved' (*h*).

(*a*) Stair i. 6, 44, 9th sentence; Bankt. i. 7, 80; Ersk. i. 7, 36; Wall. Prin. p. 384, and authorities from the Roman law already cited.

(*b*) Stair, *ibid.*; *per* Lord Fountainhall in 2 Sup. 611; Vinn. Partit. c. xliv.

(*c*) Stair, *ibid.*; Bankt. *ibid.*; Ersk. *ibid.* *Kennedy* v. *Weir*, M. 11658 (1665); opinion of Court in *Wemyss* v. *Creditors*, M. 9025 (1637).

(*d*) *Johnston* v. *Ferrier*, M. 8931 (1770).

(*e*) Code ii. 43, laws 1 and 4. *Sutherland* v. *Morson*, 19 Jan. 1825, 3 S. 449; *Bell* v. *Wilson*, M. 8943 (1639).

(*f*) *Bell* v. *Wilson*, *supra*.

(*g*) *Wemyss* v. *Creditors*, M. 9025 (1637).

(*h*) Bankt. i. 7, 81.

Dispensation of age.

A minor who has obtained a dispensation of age from the Crown (*a*), cannot claim restitution on the head of minority and lesion against deeds executed by him after the age at which he has been declared major (*b*).

Ratification of the deed.

By the Roman law, and by a constitution of Frederick Barbarossa (*c*), and by the canon law (*d*), it was declared that if a minor gave his oath that he should never challenge any contract into which he had entered, he was for ever barred from all redress. This doctrine the Scotch courts at first refused to adopt (*e*); but afterwards they sanctioned it, on the ground that if minors were allowed to reduce such deeds, 'they would have greater lesion by the perjury than the damage' (*f*). The last decision by which it was recognised was that of *Mordington;* for Sir George Mackenzie states (*g*), that immediately on that decision being pronounced, the judges gave instructions to draw up the Act 1681, c. 19, by which the exaction of such oaths in future was prohibited, the contracts annulled, and the elicitor of the oaths declared infamous. And as the minors might scruple to pursue a reduction of a writ that they themselves had fortified by oath, it was declared that it should be competent to any person related to the minor, 'to obtain the said writs to be declared void and null, by way of action, exception, or reply.' This, therefore, prevented the minor, by any deed during his minority, from doing anything which might bar a challenge. After majority, however, it is different; for the minor being then *sui juris*, and in law presumed of full capacity to attend to his own interests, any deed ratifying transactions which took place during minority will cut him out from after challenge, not only against third parties, but also against his own tutors and curators (*h*).

(*a*) See *supra*, p. 146.

(*b*) Balf. p. 181, c. 9; Spottiswoode's Practicks, 301; Bankt. i. 7, 103.

(*c*) Code ii. 28, 1; 2 Lib. Feudor 53, s. 3.

(*d*) Decreti, Pars ii. caus. 22, quæst. 5, c. 14 and 15; Ant. Merend. lib. 1; Controv. cap. 1.

(*e*) *Barnbugil* v. *Hamilton*, M. 8915 (1567).

(*f*) *Hepburn* v. *Hepburn* (1634), M. 8921; *Waugh* v. *Baillie*, M. 8922 (1672). See also *Mordington* v. *Oliphant*, M. 8923, 3 Sup. 320 (1677). Stair i. 6, 44, 5th sentence; Bankt. i. 7, 82; Ersk. i. 7, 39.

(*g*) Obs. on 1681, c. 19.

(*h*) Balf. p. 181, c. 8; Stair i. 6, 44, 9th sentence; Bankt. i. 7, 90. *Southesk* v. *Philliphaugh*, 1 Sup. 603 (1670); *Kyle* v. *Allan*, 23 Nov. 1832. Dig. iv. 4, 3, 1; Code ii. 53 *ult.;* Paul Sentent. i. 9, 3; Code ii. 46, 2. *Roberton* v. *Roberton*, 2 July 1831, 9 S. 865; 1 Bell's Com. 135.

What deeds by minor amount to ratification.

The ratification may be either by express deed or impliedly. With regard to the former, it may be either by express deed of ratification, or by fitted accounts, or by renewed bill granted for the amount of the first bill, or even by an acknowledgment gathered from the terms of the correspondence between parties (*a*). With regard to the latter, it is often difficult to decide whether the acts of ratification are sufficient. There is no general rule to settle what acts or words, or abstinence from acts or words, will be effectual to infer homologation. Each is a special case. Payment of interest on a bond sought to be reduced has been held to be enough (*b*); and in other cases this has been disregarded (*c*). Receiving rent in terms of a lease has been sustained as homologation of the lease (*d*); and in another case, where the circumstances were different, an opposite decision was given (*e*). If the party, after majority, should assign the subject purchased, this would be a recognition of the transaction, and bar restitution (*f*); and if after majority he should pursue the tutor for the price of lands unwarrantably sold, he is presumed to have passed from his right to challenge the sale; or if he receive payment from the purchaser of all or part of the price, or complete a transaction begun in minority (*g*), or pay the whole or part of the price of a bond which in minority he had become bound to pay (*h*), the right of being restored is gone.

The ratification must be executed by the minor deliberately, in the full knowledge of the whole circumstances of the case; and there must be no fraud, undue influence, or insidious arts, used to induce him to grant the deed. A ratification was reduced at the distance of thirty years, because obtained from the person who had been minor, fraudulently (*i*); and it was held insufficient to bar the challenge, that after majority he had approved of certain accounts in which some bills which he wished to reduce were included; because this act of ratification was slight, was done within

(*a*) *Roberton* v. *Roberton*, 2 July 1831, 9 S. 865; *Maxwell* v. *Pringle* (1760), M. 16431; *Forrest* v. *Campbell*, 4 Nov. 1853, 16 D. 16.

(*b*) Ersk. i. 7, 39; *Johnston* v. *Hope*, M. 9041 (1630); *Gardner* v. *Chalmers*, M. 9024 (1636).

(*c*) Bankt. i. 7, 90; *Cockburn* v. *Halyburton*, M. 9009 (1672).

(*d*) *Gordon* v. *Hall*, M. 15178 (1757).

(*e*) *Harvie* v. *Gordon*, M. 5712 (1726).

(*f*) *Montrose* v. *Livingstone*, M. 9046 (1697).

(*g*) Dig. iv. 4, 3, 1.

(*h*) Dig. xiv. 6, 7 *ult.*

(*i*) *Leiper* v. *Cochran*, 9 July 1822, 1 S. 552.

fourteen days after majority, and under the influence of his father (*a*). The homologation, in short, must be made with a full knowledge of the legal rights competent to the party making it (*b*). Where a ratification is granted after majority, the leaning will be against it in any question with a tutor or curator, if the tutorial or curatorial accounts have not been adjusted and settled (*c*); and although a minor in his contract of marriage recognise the deed, this will not be considered a ratification, so as to bar a subsequent challenge (*d*). But although a person after majority will not be held bound by a ratification impetrated from him by unfair means, he must condescend specially on circumstances of fraud or circumvention. So, a general averment of misrepresentation and concealment on the part of a brother, was held irrelevant to infer reduction of a probative document, granted to third parties, homologating a transaction entered into in minority, there being no allegation of mental incapacity (*e*). A deed cannot be ratified after the minor's creditors have challenged it (*f*).

Quadriennium utile.

IV. The law of Scotland, following the Roman law (*g*), has appointed a period within which the minor must use the privilege he enjoys of getting himself restored against deeds to his lesion. This period has been fixed at four years after majority, called *anni utiles*, or *quadriennium utile*, during which the minor may consider whether he has been wronged by deeds done in his minority (*h*). Like minority itself, the *quadriennium utile* is computed *de momento in momentum*, and so the privilege may be exercised even on the last day of the four years (*i*). If this period be allowed to expire without the institution of the necessary process for obtaining restitution (to be immediately described), the minor is for ever barred from challenging the deed on the head of minority and lesion, and a *presumptio juris et de jure* arises in favour of the deed, against which

(*a*) *Melvil* v. *Arnot*, M. 8998, Hailes 904 (1782).

(*b*) *Dempster* v. *Potts*, 30 and 31 Dec. 1837, 15 S. 364, and 12 F. C. App. 25.

(*c*) Bankt. i. 7, 70. See *Bennet* v. *Reid's Trs.*, 27 May 1828, 6 S. 854.

(*d*) *Rose* v. *Rose*, 20 Nov. 1821, overruling *Henderson* v. *Dryburgh*, M. 8992 (1684).

(*e*) *Kyle* v. *Allan*, 23 Nov. 1832, 11 S. 87.

(*f*) *Harkness* v. *Graham*, 20 June 1833, 11 S. 760.

(*g*) Code ii. 53.

(*h*) Balf. p. 181, c. 8; Stair i. 6, 44; Bankt. i. 7, 74; Erak. i. 7, 35; M'Ken. i. 7, 13.

(*i*) Code ii. 53.

no contrary proof will be allowed, 'because he, be ressoun of his sa lang silence and taciturnitie, is, tacitlie and in effect, understuid to ratifie and appreve, all alienatiounis and dispositiounis maid be him of befoir, for quhatsumever cause helpfull or hurtfull unto him' (*a*).

Where the minor is *non valens agere* during the *quadriennium*.

To this rule there are exceptions; for if the minor during the *quadriennium utile* were *non valens agere cum effectu*, *e.g.* if a wife, when a minor, had granted a deed to her husband, and during the *anni utiles* was *sub cura mariti*, restitution would be competent to her after the expiry of that period, and until the dissolution of the marriage (*b*). But it is not settled how long the privilege is competent to her after the marriage is dissolved, whether it is to run for four years from that event, or to exist only during what the Court shall consider a reasonable time. It would rather appear that the latter is the law (*c*). If the deed were in favour of a third party, not the husband, the wife must pursue her action of reduction *intra quadriennium utile* as all other minors (*d*).

Deeds *ipso jure null* may be reduced within forty years.

If the deed against which the minor seeks to be restored be not merely voidable, but *ipso jure* void, such as a deed by a pupil (*e*), by a minor without consent of his curators (*f*), by a minor in favour of his tutors or curators without value received (*g*), or a decree pronounced against a minor by an incompetent court (*h*), there is no ground for the application of this rule of *quadriennium utile;* and such deeds may be set aside any time within the forty years, because here the ground of reduction is not

(*a*) Balf. p. 181, c. 8. See also Ersk. i. 7, 35; 1 Bell's Com. 135; *Glentoris* v. *Kirkpatrick*, M. 8978 (1543); *Grundiston* v. *Lawson*, M. 8978 (1561); *Hamilton* v. *Sharp*, M. 8981 (1630); *Ramsay* v. *Maxwell*, M. 9042, 2 Sup. 617 (1672).

(*b*) Fraser, Pers. and Dom. Rel. vol. i. p. 281.

(*c*) *Gray* v. *Stewart*, M. 6059 (1714); opinion of Court in report by Bruce, 14 Dec.

(*d*) Fraser, Pers. and Dom. Rel. vol. i. p. 281.

(*e*) *Bruce* v. ——, M. 8979 (1577). Ersk. i. 7, 34.

(*f*) *Kincaid* v. ——, M. 8979 (1561); *Robertson* v. *Oswald*, M. 8980 (1584); *Hamiltons* v. *Hamilton*, M. 8981 (1587); *Harvie* v. *Gordon*, M. 5712 (1726); *Bell* v. *Sutherland*, M. 8985 (1728). Bankt. i. 7, 88; Ersk. i. 7, 34.

(*g*) *Thomson* v. *Pagan*, M. 8985 (1781); *M'Kenzie* v. *Fairholm*, M. 8982, 8959, 16278, 1 Sup. 530 (1666); *Manuel* v. *Manuel*, 15 Jan. 1853, 15 D. 284, 2 Stu. 569; *M'Gibbon* v. *M'Gibbon*, 5 March 1852, 14 D. 605.

(*h*) *Rankine* v. *Rankine*, 31 May 1821, 1 S. 43. It was also held here, that a tutor could not for a pupil prorogate jurisdiction.

a privilege competent only to minors, but a right to reduce a deed which has never been validly executed. Wherever the guardian is guilty of fraud, the minor may reduce at any time. An estate was disponed by antenuptial contract to the heirs of the marriage. A minor grandchild of the marriage, with concurrence of his curators, renounced, in a deed of submission with his grandfather, his right to the estate, on payment of a price to be fixed by arbiters. A small sum was thereupon awarded, and the grandfather obtained from the grandchild, after majority, a ratification and discharge, and thereupon disponed the estate to the children of a second marriage. The Court held, after the lapse of thirty years, that as there was evidence *in gremio* of fraud, the renunciation was not binding, and that it could not be made effectual by the posterior ratification (*a*). The House of Lords, in a late case, seem to doubt the doctrine laid down by the Court of Session, that a minor could not obtain restitution against the penal consequences of vitious intromission, unless he had brought his reduction *intra quadriennium* (*b*). In the case of *Manuel*, the deed was in favour of the curator, and sought to be reduced after the lapse of the *quadriennium utile*. The fact of minority appeared on the face of the deed. Upon this point the Lord Ordinary (Rutherfurd) said: 'The Lord Ordinary is of opinion that the lapse of the *quadriennium utile* is no answer to a reduction on such grounds. Assume, what the pursuer offers to prove, that the bond was exclusively for the father's behoof, and was known by the defender to be so, the father could not, for his own benefit, act as administrator-in-law for his child. It would have been null if James Manuel the pursuer had granted it without the father's consent; and the father's consent, instead of improving the case, does the reverse, if, in the knowledge of the taker of the bond, the father alone was to benefit. A deed granted by a minor having curators, without their consent, is null. It is no consent of curators if the deed is in their own favour, or for their own benefit. An objection of nullity is not barred by the expiration of the *quadriennium utile*. The present case excludes any question which might arise where the nullity was not patent upon the face of the instrument, both because of the

(*a*) *Leiper* v. *Cochran*, 9 July 1822, 1 S. 552.

(*b*) *Kerr* v. *Bremner*, 5 March 1839; H. of L. 9 May 1842, 1 Bell's App. 280.

statement of the instrument and of the averred knowledge of the defender' (*a*).

Although the period of ten years after majority is granted, within which a minor may insist for an account of his tutor's intromissions, yet he cannot, except during the *quadriennium utile*, reduce any deed which is not null *ipso jure*, even in a question with his guardians; and if he omit to challenge the deed within that time, he cannot have recourse against his tutors and curators (*b*).

How restitution is made.

V. As restitution on the head of minority and lesion is requisite only in acts which are voidable, and not in regard to those which are *ipso jure* void, any deed of revocation executed by the minor would be unavailing to restore him, because that is a mere private act of his own, without notice to the opposite party, while the deed can only be set aside *causa cognita* (*c*). It is therefore necessary, that during the *quadriennium utile* the minor or other person insisting in this privilege should institute an action of reduction to set the deed aside (*d*).

The privilege of the *quadriennium utile* can only be made available by means of an action of reduction. The action of reduction is the only *habile* mode recognised by the institutional authorities and the decisions. Effect was given to this in a late case, where minority was pleaded by way of exception within the *quadriennium utile*, but an action of reduction was not raised till after it had elapsed. The Lord President (M'Neill) observed: 'It is a privilege that is given to a minor to be restored *ad integrum*; and I think all the authorities go to this, that he is to be restored by reducing and setting aside the act complained of, but it is given only if exercised within four years. It is not a question of right of action. It is a privilege if certain steps are taken for rendering that privilege effectual, and it is rather a misapplication of terms to.

(*a*) *Manuel* v. *Manuel*, *supra*.

(*b*) *Cunningham* v. *Curators*, M. 16338 (1727). Ersk. i. 7, 35; More's Notes, p. xlv.

(*c*) *Marquis of Montrose* v. *Livingston*, M. 9046 (1697). Ersk. i. 7, 35; Bankt. i. 7, 74. *Ramsay* v. *Maxwell*, M. 9042, 2 Sup. 617 (1672).

(*d*) Stair i. 6, 44 *in fin.*; Craig ii. 3, 11; Bankt. i. 7, 74; Ersk. i. 7, 35. *Murray* v. *Cochran*, M. 9041 (1630); *Ramsay* v. *Maxwell*, M. 9042 (1672); *Montrose* v. *Livingston*, M. 9046 (1697); *Hamilton* v. *Sharp*, M. 8981 (1630); *Arbuthnot* v. *M'Dougall*, M. 9044 (1682).

call what was done in the first action a challenge. There is no challenge except that which is done in competent form. It may be there was a statement that there was ground for challenge. But that is not a challenge. Bringing an action of reduction is the only thing that the law recognises as sufficient to restore him' (*a*).

This action is only competent before the Court of Session (*b*). If the summons be served, this will preserve the privilege for seven years, though no further step be taken in the matter during the *quadriennium utile*. At the end of seven years the citation will require to be renewed, to prevent the privilege falling (*c*). After the action has become a depending process, it subsists for forty years (*d*).

Whether reduction be necessary.

It does not seem to be necessary in all cases to institute a regular action of reduction, in order to state the plea of the minor. As regards ordinary deeds, it may be regarded as now fixed that an action of reduction is necessary, and the only proper course (*e*); but in several cases the Court have allowed the minor to urge it by way of exception or in a suspension, the ground of distinction apparently being that in those cases there was a presumption of lesion. A minor who had accepted a bill was found not entitled to redress by way of suspension (*f*); but in one case, the House of Lords, without reduction, allowed the minor to be restored (*g*). It was observed in a later case relative to a different subject, that 'it is not easy to see the grounds on which the necessity of a reduction is founded. There is one which has been given by some lawyers, which is this, that where a defence pleaded *ope exceptionis* is sustained, the decision only goes to affect the instrument to that particular effect, whereas a reduction sets aside the whole instrument. But the principle, after all, is very obscure. However, as

(*a*) *Stewart* v. *Snodgrass*, 20 Dec. 1860, 23 D. 187.

(*b*) Ersk. i. 7, 34.

(*c*) 1669, c. 10. *Forfar* v. *Douglas*, M. 11324 (1699); *Arbuthnot* v. *M'Dougall*, M. 9044 (1682).

(*d*) Bankt. i. 7, 75.

(*e*) *Stewart* v. *Snodgrass*, 20 Dec. 1860, 23 D. 187, and *dicta* of the judges there. For the form of the summons, see Dallas, Part iii. p. 192; Jurid. Styles, iii. p. 214.

(*f*) *Waddell* v. *Gibson*, 18 Jan. 1812, F. C.

(*g*) *Crawford* v. *Bennet*, 19 June 1827, 2 W. S. 608. See also *A.* v. *B.*, M. 9045 (1655); Stair i. 6, 44, 2d sent.; Wall. p. 388; *Dick* v. *Cuming*, 8 July 1824, 3 S. 231; *Harkness* v. *Graham*, 20 June 1833, 11 S. 760.

we now allow reductions to be repeated, the hardship of insisting upon their being repeated for the sake of form is very small' (*a*).

Who must be called, and effect of the reduction.

The proper party must be called in the action (*b*); but it is not necessary to call the tutors and curators (*c*). An assignee, and not the cedent of a bond sought to be reduced, must be called (*d*).

Against what parties the minor has redress.

VI. Where the party with whom the minor or his guardian dealt has dropt out of the transaction, by assigning his right away to another, the right to be restored is affected by the circumstances as to whether the assignee gave value for the assignation, and whether the right be personal or real. Where the deed is gratuitous *quoad* the singular successor, the minor has the same defence against him as against the original creditor (*e*). But where the transaction is onerous, a distinction is taken between rights real and personal. With reference to real rights completed by infeftment in the person of the party who has obtained the minor's property, an onerous singular successor from him, trusting to the records, is protected against all challenge from any latent objection on the head of minority and lesion, unless the matter had been rendered litigious before he obtained his right, or unless he were *in mala fide* to acquire, knowing that the estate had been obtained from a minor, or seeing it so stated *in gremio* of the titles (*f*).

With regard to *personal* rights onerously acquired from the minor's assignee, Erskine lays down the unqualified doctrine, that 'though they be onerous purchasers, the minor may be restored against them, if the right they have acquired be barely personal; for it is a general rule in all personal rights, that every exception is good against the onerous purchaser which is good against the original creditors' (*g*). It may be doubted how far the decisions bear out this doctrine (*h*), which, however, is also laid down by

(*a*) *Telfer* v. *Barrow*, 30 Nov. 1844, Jur.

(*b*) See next section, and these cases: *Belches* v. *Calderwood*, M. 9045 (1687); *Ruthven* v. *Gray*, M. 31 (1672).

(*c*) *Vernock* v. *Hamilton*, M. 9047, 2214 (1637); *Stewart* v. *Stewart*, M. 9008 (1638); *Blantyre* v. *Walkinshaw*, M. 2215 (1667). Bankt. i. 7, 76; Ersk. i. 7, 34.

(*d*) *Blantyre*, *ibid.*

(*e*) Ersk. i. 7, 40; Wall. Prin. p. 387; Dig. iv. 4, 13, 1.

(*f*) Bankt. i. 7, 95; Ersk. i. 7, 40. *Campbell* v. *Graham*, M. 9021 (1752); *Gourlie* v. *Gourlie*, M. 10288 (1728).

(*g*) Ersk. i. 7, 40.

(*h*) *Anderson* v. *Spence*, M. 10286 (1683); *Craick* v. *Maxwell*, M. 9029 (1682).

Bankton (*a*). Restitution will be granted against the general creditors of the party who contracted with the minor (*b*).

Where the other contractor is also a minor.

In the case where two minors contract, and where one of them seeks to be restored on the head of minority and lesion, the law of Scotland has adopted the equitable rules of the Roman law (*c*). If one of them cheat the other, the party wronged is entitled to redress in the same manner as against a major; and the wrongdoer will be obliged to restore any money he has received from the other, even although he did not profitably expend it. In like manner, the minor would be liable to a major whom he had cheated. *Cum malitia suppleat ætatem restitutionis auxilium denegari statutum est* (*d*). Even although the minor against whom the action is brought may not have cheated the other, yet the latter will be entitled to restitution, in so far as the former is a gainer by the transaction; his case being more favourable, as being *de damno vitando*, while the other is *de lucro captando* (*e*). On the other hand, where both parties are, without fraud of either, lesed by the transaction, the rule holds, *Melior est causa consumentis, nisi locupletior ex hoc inveniatur litis contestatæ tempore* (*f*). He who is under an obligation to pay, or to perform anything to the other in return for something already given or done to him, will be relieved from it (*g*). Thus, for example, if one minor, without fraud, borrow from another, and unprofitably squander the money, the lender cannot demand repayment from the borrower though he himself be thereby a loser (*h*). For seeing that, as in all the cases of this nature, the obligation of a minor for a cause which has not turned out profitably to him ought to be annulled, the consequence of the loss which happens thereby to him who had treated with the minor does not alter his right nor validate his obligation; the loss being considered a mere accident, or as an event which he who had treated with the minor ought to blame himself for (*i*).

Restitution against the fisk.

By a very old decision, it was found that a minor offering himself as cautioner for the fisk cannot claim the privilege of restitution

(*a*) Bankt. i. 7, 95.
(*b*) *Moncreiff* v. *Mitchell*, M. 8996 (1729).
(*c*) Bankt. i. 7, 92; Ersk. i. 7, 40.
(*d*) Code ii. 43, 3.
(*e*) Ersk. i. 7, 40.
(*f*) Dig. iv. 4, 34; Dig. xlv. 1, 91, 3.
(*g*) Ersk. i. 7, 40.
(*h*) Dig. iv. 4, 11, 6; Ersk. i. 7, 40; Bankt. i. 7, 92.
(*i*) Domat's Civil Law, vol. i. p. 534, No. 18.

to the prejudice of the Crown, because the fisk is also privileged (*a*), a decision contrary to the Roman law (*b*).

Effect of the restitution.

VII. The decree of reduction places the minor in the same position he would have been in had he never granted the deed reduced: the right is set aside, not from the date of litiscontestation, but from the beginning (*c*). The reduction calls into existence the former title of the minor, there being no necessity that he be infeft of new (*d*).

Restitution is mutual.

The restitution, from the very nature of the privilege, implies that it ought to be mutual (*e*). *Restitutio autem ita facienda est, ut unusquisque integrum jus suum recipiat* (*f*). There is no difficulty in the application of this rule when matters are entire; as, for example, in a sale of a minor's property, where the price is still *in esse*, and the property unchanged in value, either by improvements or deteriorations. Here the minor must restore the price with interest before he can claim his lands, and the intermediate rents, fruits, and profits (*g*). If this be repaid, he is entitled to his property freed and disburdened of any right competent to the creditor; for although the restitution is only against lesion, this will not entitle a purchaser to keep the subject, offering the balance of the value of the land or other property: he can only demand mutual restitution or indemnification (*h*). The exception to this rule is, that the minor must reimburse the other for what is *in rem versum* of him by any improvement made upon the subject of the contract (*i*). If a minor were to sell his estate, he (as already stated) could be restored against the sale without being obliged to refund any part of the money received if it had been unprofitably squandered (*k*); but if any of it had been otherwise applied, or if the purchaser had made improvements on the property purchased, the minor must reimburse *pro tanto* (*l*).

(*a*) *Forrous* v. *Gourlay*, M. 8917 (1593).

(*b*) Code ii. 37.

(*c*) *Houston* v. *Maxwell*, M. 8986 (1631).

(*d*) Dirl. and Stew. pp. 330–1.

(*e*) Code ii. 48, 1; Dig. iv. 4, 24, 4; Balf. p. 182; Bankt. i. 7, 83 and 94; Ersk. i. 7, 41; 1 Bell's Com. 136.

(*f*) Dig. iv. 4, 24, 4.

(*g*) Ersk. i. 7, 41; 1 Bell's Com. 136. *M'William* v. *Shaw*, M. 9022 (1576).

(*h*) 1 Bell's Com. 136; Bankt. i. 7, 83; *supra*, p. 395 (*e*).

(*i*) Bankt. i. 7, 94; Ersk. i. 7, 41; Wall. 392; 1 Bell's Com. 136.

(*k*) Ersk. i. 7, 41, and other authorities, *supra*; *Thomson* v. *Stevenson*, M. 8983 (1666), Dirleton's Report.

(*l*) Dig. iv. 4, 24, 4; Wall. p. 392; Ersk. i. 7, 41.

In considering what are improvements in a question of this sort, it was determined in the Roman law, that alterations intended merely for pleasure or ornament would not be so reckoned. And the purchaser was not allowed even to carry away things of this nature, if by being rendered fixtures their removal would injure the property (*a*).

Money borrowed.

Where a minor has borrowed money, he will be restored, as already stated, against his obligation, except in so far as the money was *de in rem verso* (*b*). And in cases of this sort, where the major, after the contract, buys other rights, so as to fortify his title, the minor is not obliged to compensate him therefor, unless in so far as they are for the minor's advantage (*c*).

When contract is not voluntary on part of other contractor.

In cases where a party contracting with a minor must do so *ex necessitate*, the restitution must be in all respects equal. Thus, where a minor is served heir or executor to his ancestor, he cannot be restored against the act, on the subsequent ascertainment of the ancestor's bankruptcy, till he account for all the rents, profits, and dividends which he or his tutors drew or might have drawn from the estate, including in this, money recklessly squandered by the tutors or the minor; because the service in this case operated as an effectual bar to the creditors obtaining possession for themselves, and it was no fault of theirs that the minor or his tutors had an opportunity of squandering the money received (*d*). The intromission of the husband of a minor wife is in this matter the same as her own, because the husband's *jus mariti* is a legal assignation, equivalent to a voluntary right from the wife, and she must therefore account for his intromissions before she will be restored (*e*). When the minor, during the time of intromission with the rents, has applied them in paying just debts due by the ancestor, such payments will be sustained (*f*). In one case, the defence of *bona fide percepti et consumpti* was held effectual (*g*).

(*a*) Dig. iv. 4, 27, 2; iv. 4, 39, 1; iv. 4, 47 *ult.*; Bankt. i. 7, 94.

(*b*) *Supra*, p. 408; Ersk. i. 7, 41.

(*c*) *Thoirs* v. *Tolquhoun*, M. 8993 (1688); Bankt. i. 7, 94.

(*d*) Ersk. i. 7, 41. *Farquhar* v. *Campbell*, M. 9022 (1628 and 1630); *Aberdeen* v. *Barclay*, M. 9031 (1708); *Wright* v. *Brown*, M. 9030 (1685); *Erskine* v. *Erskine*, M. 9002 (1739); and cases *supra*, p. 398.

(*e*) *Wright* v. *Brown*, M. 9030 (1685).

(*f*) *Ruthven* v. *Hope*, M. 9030 (1682).

(*g*) *Winton* v. *Winton*, M. 9047 (1666).

CHAPTER II.

PRIVILEGE OF MINORS RELATIVE TO THE VARIOUS KINDS OF PRESCRIPTION.

ANOTHER privilege possessed by minors is in reference to the law of prescription, the operation of which against them has been much modified. On the ground that they cannot be so well acquainted with their own affairs, or the law applicable to their circumstances, as to enable them to act so prudently for themselves as majors would in the like circumstances do, they have, on the precedent of the Roman law (*a*), been so privileged that several of the prescriptions do not run against them.

The privilege, however, does not extend to all the prescriptions known in our law; for the statutes, while they expressly exempt minors from the operation of several prescriptions, make no mention of such a privilege in regard to others. All our lawyers are agreed, that the privilege expressly conferred by some statutes ought not to be extended to those in which it is not mentioned, because all privileges are exceptions from a general law; and when a number are expressly specified, it is the meaning of the party making these that no other cases shall be excepted (*b*). The reason sometimes assigned for the distinction in the various statutes is this, that the cases wherein they privilege minority, are those where the prescription infers an absolute annihilation of the pursuer's claim, such as the long prescriptions (*c*); but this reason is erroneous, in-

(*a*) Code vii. 26, 2, and vii. 35, 3, and ii. 41, 5.

(*b*) M'Ken. Obs. on 1579, c. 83; Bankt. ii. 12, 43; M'Ken. Obs. on 1669, c. 9. *Stewart* v. *Douglas*, M. 11151, 4 Sup. 913 (1712); *Brown* v. *Brodie*, M. 11150 (1709); Arg. *Ramsay* v. *Miller*, 4 Sup. 644 (1706); *dictum* of Lord Pitfour in *Campbell* v. *Wilson*, 5 Sup. 915 (1765). See also *Baird* v. *Fortune*, 13 June 1861, 23 D. 1080.

(*c*) See *Brown* v. *Brodie*, *supra*.

asmuch as the septennial limitation has this effect, and no privilege is given to minors in relation to it.

There is one decision reported by Fountainhall (*a*), which, if taken as abridged by Lord Kames (*b*), without its explanation, would seem to contradict the above general rule as to cases not specially excepted. 'The Lords,' says Fountainhall, 'found, though the 13th Act of Parliament 1617 *does not expressly except minority* from that vicennial prescription of retours, yet it was included in the Act, and behoved to be deducted from the twenty years of prescription.' The facts were, that the Act 1617, c. 13, was a law correctory of the former statute 1494, c. 57, and its chief object was to alter the period of prescription from three to twenty years. But as to all other points it left unrepealed the former statute, which contained an express reservation of the privilege to those who were not of 'lauchful age.' This decision, therefore, does not trench upon the general rule. Wherever the privilege is competent to minors in general, it may be pleaded, though the minor be engaged in trade, notwithstanding that, in such a case, he could not plead the privilege of *restitutio in integrum* (*c*).

Minority only suspends the prescription.

Minority, though it is commonly so termed, is not, in correct legal language, an interruption of prescription; it is only a suspension or stay of it: and this difference is not merely verbal. For after every proper interruption of a prescription, the whole period that has run before the interruption is thrown out of view altogether, and a new term of prescription begins from the interruption. It is different with regard to a suspension; for, in such a case, the years that had run before the suspension had commenced will be added to those after it had expired, in order to make up the full period required by law. If, therefore, twenty years of the long prescription had passed before the minority of the party against whom it was running had suspended its currency, these twenty years will be added to another twenty after the minority is at an end, and so complete the full time (*d*).

(*a*) *Edinglassie* v. *Powrie*, M. 10987 (1701).

(*b*) M. 11149.

(*c*) *M'Donald* v. ——, M. 9038 (1789).

(*d*) Ersk. iii. 7, 45. *Marchmont* v. *Home*, M. 11154 (1714); *Dalrymple* v. *Duncan*, Elch. *v.* Presumption 14 (1737).

What prescriptions do not strike against minors.

I. The cases where the prescriptions do not run against minors are these. 1. The triennial prescription of actions of spuilzie, ejections and intrusions (*a*). 2. Minority suspends the positive and negative prescriptions of forty years (*b*). It was, however, doubted in a late case, whether this could be held settled as to the negative prescription (*c*). 3. The vicennial prescription of retours does not operate against minors (*d*). 4. The vicennial prescription of holograph obligations; the quinquennial (now triennial) prescription of arrestments upon decreets, registered bonds, dispositions, contracts, or the dependence of actions; the quinquennial prescription of ministers' stipends and multures; the quinquennial prescription of rents due by tenants; the quinquennial prescription of bargains concerning moveables. As to these, the statute declares 'that prescription shall not run in any of the cases foresaid against minors, during the years of their minority' (1669, c. 9). 5. The quinquennial prescription of actions *which have been raised* upon warnings, spuilzies, ejections, arrestments, or for minister's stipend (*e*); which, but for this prescription, would have continued unprescribed for forty years (*f*). 6. The septennial prescription of interruptions of prescription. This prescription strikes against all citations used for this purpose, 'except the parties be minors; in which case this Act is not to be extended against them during the years of their minority' (1669, c. 10). 7. The sexennial limitation of bills. By 12 Geo. III. c. 72, ss. 37 and 40; 23 Geo. III. c. 18, s. 55, it is provided, 'that the minority of the creditor shall not be computed.' 8. The decennial prescription of tutorial and curatorial accounts (1696, c. 9). 9. The biennial limitation of the right of appeal from the judgments of the Court of Session to the House of Lords

(*a*) 1579, c. 81; *Cumming* v. *Montgomerie*, M. 11147 (1610).

(*b*) *Blair* v. *Sheddan*, M. 11156, 5 Sup. 825 (1754); *Fullarton* v. *Dalrymple*, 23 Nov. 1798, M. 11171, and 1 W. and S. Appeal Ca. App. Stair ii. 12, 18; M'Ken. ii. 12, 15; Kames' Elucid. Art. 33; Ersk. iii. 7, 35; *Sinclair* v. *Brown*, *ut infra*. See *Ross* v. *Mackenzie*, M. App. *v.* Prescription 1 (1776), aff. April 1776, 3 Pat. App. Appx. 676; *Marchmont* v. *Home*, M. 11154 (1714).

(*c*) *Sinclair and Others* v. *Brown*, 3 March 1835, 13 S. 594; remitted on appeal 17 July 1835, 2 S. and M'L. 105; adhered to 9 March 1837, 15 S. 770, and 10 March 1841, 3 D. 871.

(*d*) 1617, c. 13, read in connection with 1494, c. 57; *Edinglassie* v. *Powrie*, M. 11149 (1701).

(*e*) 1669, c. 9, read in connection with 1685, c. 14.

(*f*) M'Ken. Obs. on 1669, c. 9.

does not strike against minors, in regard to whom it is declared, that the two years shall only be computed from their majority (6 Geo. IV. c. 120, s. 25).

10. The legal in adjudications is likewise extended in favour of minors to the following effect. If at the date of the adjudication the defender be minor, he is allowed at least the ten (formerly seven) years given to all parties whose property is adjudged; but he is, moreover, allowed the whole period of his minority, and the four *anni utiles* beyond it, though this be more than the ten years; so that he is not shut out from his right to redeem until he has arrived at the age of twenty-five. Where the minor dies during his minority, and another minor heir succeeds to him, the latter is entitled to the same legal as his predecessor. He may redeem, therefore, any time before he is twenty-five years of age, and the case is regarded in the same light as if the adjudication had been led against himself. And where a minor succeeds to a major debtor, he is allowed, until he be twenty-five, to redeem. On the other hand, if a major succeed to a minor debtor, he does so either *during* the ordinary legal or *after* it. If the former, then he gets all that remains of the ordinary legal during which to exercise his right of redemption; and if this period be less than one year, he is entitled to as much beyond the legal as will make up a year. If the latter, he is entitled to a year from the minor predecessor's death (*a*). A minor singular successor of an adjudgee is entitled to the same privilege as a minor heir. Thus, a minor who adjudges a right of reversion from the party entitled to redeem, is entitled to the same privilege arising from minority, as if he had succeeded as heir (*b*). 11. In one case, a majority of the Court were of opinion that in calculating the year and day, in the *pari passu* rankings of adjudications, the minority of a minor adjudger must be deducted; but the question was not decided (*c*). 12. Where an adjudger has not obtained a decree of declarator of expiry of the legal, he requires to possess the lands for forty years on charter and sasine before his redeemable can become an irredeemable right.

(*a*) 1621, c. 6, read in connection with 1672, c. 19; Ersk. ii. 12, 10 and 41; Stair i. 6, 44, and iii. 2, 14; Darling's Practice, p. 449.

(*b*) *Oliphant* v. *Hamilton*, 3 Sup. 202 (1677).

(*c*) *Dalrymple* v. *Duncan*, Elch. *v.* Presumption, No. 14, and Notes (1737).

In counting these forty years, the minority of the debtor must be deducted (*a*).

How adjudger accounts to minor.

After the minor's property has been adjudged, and the adjudger entered into possession, the mode in which he is to account for the rents and profits drawn by him is settled as follows:—During the running of the ordinary legal, it was declared by statute 1621, c. 6, that the adjudger must account for everything drawn by him, from the property adjudged; but after its expiry, he has right to meddle and intromit with the whole mails and duties of the lands apprised, for all the years subsequent to the expiry of the legal, till the termination of the minority, and of the four *anni utiles* thereafter. This language was thought ambiguous, inasmuch as it did not determine whether the appriser was entitled to appropriate to himself, without accounting, the whole rents of these years, seeing that he could not do so for the years constituting the legal. The Court found that the Legislature meant to draw a distinction between the two periods, the period of the legal and the period after it, till the expiration of the *quadriennium utile;* that in the latter period, though the minor was allowed a privilege to redeem, in the same manner as a major during the legal, yet as it was unnecessary, in order to protect him, to overthrow the rules of the common law further than to give him this right of redemption, he would not be allowed to call the adjudger to account for the rents of the years subsequent to the legal, seeing that no other debtor could (*b*). But the Legislature afterwards held this to be an erroneous interpretation of the statute 1621: for by Act 1663, c. 10, they declare that it was unreasonable that the creditors should, during the not expiry of the legal reversion, 'which according to law continues during their minority,' have more advantage of the estate than the interest of their debts; and that the true meaning of the Act 1621 was, that minors having right to the legal reversion should only be obliged during minority to pay the interest of the debts due by them, and that they shall have right to the surplus of the rents and duties of their lands after paying such interest.

Rankings and sales.

13. It may here be mentioned, that in rankings and sales a

(*a*) *Ged* v. *Baker*, M. 10789, Elch. *v.* Prescription 22, and Adjud. 28 (1740).
(*b*) *Rule* v. *A. B.*, M. 9048 (1639).

decree is pronounced ordaining all the creditors to lodge their grounds of debt and claims, under certification that if this be not done, decree *contra non producta* will be pronounced, and the parties' claims entirely annihilated. The Court held, in one case, that a pupil having tutors was entitled to a privilege against this; that his minority stopped any certification against him for not deponing until he were of age; and they allowed his claim to be ranked in the meantime (*a*).

Prescriptions against which minority is no privilege.

II. The prescriptions against which minority cannot be pleaded may now be stated. These are held not to be excepted from the operation of the general law, because they are not expressly saved in the Acts of Parliament by which the prescriptions were introduced.

1. The triennial prescription of actions of removing which must be raised within three years after the warning, strikes against minors (1579, c. 82). 2. So does the triennial prescription of merchants' accounts, house-rents, servants' wages, actions of debt, men's ordinaries, and the like debts, not founded on written obligations. This has been expressly found (*b*). 3. Against the septennial limitation of cautionary obligations minors have no privilege; and this also has been expressly decided (*c*). 4. Nor against the triennial prescription of actions for wrongous imprisonment (1701, c. 6). Nor, 5. The prescription introduced by the Act 1594, c. 214, which saves the right of any party producing a sasine or charter of resignation, but who is unable to produce the precept or procuratory upon which the sasine or charter proceeded.

Requisites to entitle minor to plead minority as against running of prescription.

III. In order to give the minor the privilege of pleading minority against the running of prescription, it is not essential that he himself be vested in the right against which prescription is running. It is enough if that be held for him by a trustee, although the latter have full power to uplift the debt or pursue for the claim (*d*). But the privilege is only competent to the minor entitled, at the same time when prescription is running, to make

(*a*) *Gordon*, supplicants, M. 8909 (1707).

(*b*) 1579, c. 83; *Brown* v. *Brodie*, M. 11150 (1709).

(*c*) 1695, c. 5; *Stewart* v. *Douglas*, M. 11151, 4 Sup. 913 (1712); arg. *Ramsay* v. *Miller*, 4 Sup. 644 (1706).

(*d*) Ersk. iii. 7, 45; *Gordon* v. *Maitland*, M. 11161 (1757), overruling *M'Clellan* v. *Menzies*, 11161, and 5 Sup. 847.

the demand, and has no effect in saving the rights of other minors not immediately entitled to do this. The years of minority of substitute heirs of entail are not deducted; only those of the immediate heir (*a*); and the minority of one of a number of nearest of kin only saves from prescription that part of the debt which, in the distribution of the estate, would have belonged to the minor (*b*). Although minority interrupts the running of prescription against an individual, yet the case is different where a number of persons, as a numerous partnership or a body of creditors, have a *common* interest to pursue a claim. To create a valid interruption of prescription in such a case, it would be necessary that the whole body should be minors at the same time; but its currency will not be obviated by a certain proportion only of such a body, being in minority at different times during the legal period (*c*).

(*a*) *Auchindachy's Creditors* v. *Grant*, M. 10971, Bell's Rep. p. 199 (1792); *M'Dowall* v. *M'Dowall*, Elch. *v.* Prescription, No. 20, 5 Sup. 674 (1739); *Gordon* v. *Gordon*, M. 10968, 2 Hailes 960 (1784).

(*b*) *Cuming* v. *York Building Co.*, M. 11170 (1790); *Inveraw* v. *Earl of Breadalbane*, M. 11157 and 6560 (1747), overruling *Blair* v. *Sutherland*, Elch. *v.* Minor 8 (1741).

(*c*) *Allan* v. *Brander*, 8 March 1839; *Inveraw*, *supra*.

CHAPTER III.

MINOR NON TENETUR PLACITARE SUPER HEREDITATE PATERNA.

Origin of the rule.

It is one of the most ancient rules of the common law of Scotland, derived from the feudal and not from the civil law, that a minor is not obliged to plead in defence, in any suit brought against him by a party claiming right to his heritage, upon an extrinsic objection to the validity of his ancestor's titles (*a*). *Minor non tenetur placitare super hereditate paterna.* The rule was known in the early English law (*b*), and is laid down in the most broad and comprehensive language in the Regiam Majestatem (*c*); but it is to the statute of William the Lion (*d*) that the origin of the rule as an operative part of our law is generally referred (*e*). That statute is in these terms: 'Na person within lauchfull age, may nor sould be pleyed in anie pley or action of land be the brieve of richt; Because things done be him, may na wise be sure and stable, before he come to perfite age. For gif ane minor sall be compelled to answere anent his heretage, all sic judgment sould be but mockerie and scorne.' In this statute there is no limitation on account of the mode in which the minor acquired the property, nor is there any restriction upon his privilege, from the nature of the right in the opposite party. But such restrictions and limitations have in later times been introduced; and, indeed, it may be said that the whole history of this rule is a continued series of restrictions put upon the comprehensive enactment of its author. The reason for

(*a*) Balf. p. 331; Stair i. 6, 45; Ersk. i. 7, 43.

(*b*) Glanvill, l. 13, c. 12.

(*c*) Reg. Maj. ii. 42, 8, and lib. iii. c. 32, Nos. 2, 3, 4 *seq.*, also 15–17; and Quoniam Attach. c. 99.

(*d*) Stat. Will. c. 39.

(*e*) See opinion of Court in Harcarse's report of *Fleming* v. *Carstairs*, M. 9071 (1683); plea in Falconer's report of *Craig* v. *Strang*, M. 9079 (1749); M'Kenzie i. 7, 11.

its existence cannot be ascertained from the ancient laws; but in later times we find that it was to prevent minors being at a disadvantage, as not being able to know the proper defences to state (*a*), and Sir George M'Kenzie declares that its object was 'to protect minors and to secure old estates' (*b*). In a comparatively modern case, it was argued that the rule 'is now considered more a matter of antiquity than of practice; and if not wholly in desuetude, it ought to receive the strictest interpretation, as it is unreasonable that a minor should be allowed to retain possession, without investigation, where his right is disputed' (*c*). The Court, going into the same view, observed, that they 'have had no occasion in the present age to consider the application of the maxim here founded on.' Indeed, almost all the cases on the subject belong to the early part of the seventeenth century.

When the privilege is competent to the minor, and who may plead it.

II. This defence may be competently pleaded in all cases where an action is brought, directly calling in question the minor's right to the ancestor's estate (*d*). But it may also competently be stated, in all cases where the minor's right is consequential of another, belonging to a major, whose right is that directly attacked, and by the reduction of which that of the minor would necessarily fall (*e*). But the defence will protect the minor alone, as the privilege is personal to him, and cannot be communicated to his major co-defender, and pleaded by the latter (*f*). A superior's right may therefore be evicted, though he have a minor vassal, while the defence will be sustained as to the minor (*g*); and, on the other hand, if the minor had granted a subaltern right to a major, this privilege would be denied the latter, because the minor could sustain no prejudice by the reduction of the major's right,—being only obliged in warrandice from his own proper fact and deed (*h*). A liferenter's right may be also evicted, though the fiar be under age (*i*). In a case of this latter kind, where a minor fiar was bound

(*a*) Bankt. i. 7, 107.

(*b*) M'Kenzie i. 7, 11.

(*c*) *Macfarlane* v. *Hume*, M. 9086 (1797).

(*d*) Reg. Maj. iii. 32, 2 *seq.*; Balf. p. 332, c. 5.

(*e*) *Pringle* v. *Ker and Home*, M. 9059 (1625); *Hamilton* v. *Mathison*, M. 9057 (1624). Stair i. 6, 48, par. 8; Bankt. i. 7, 110; correct M'Ken. i. 7, 11.

(*f*) *Home* v. *Homes*, M. 9057 (1613); *Hamilton*, *supra*. Stair, *supra*; Bankt. *supra*; Ersk. i. 7, 45, and Prin. i. 7, 24.

(*g*) *Home*, *Hamilton*, and *Pringle*, *supra*.

(*h*) *Stewart* v. *Home*, M. 9060 (1626).

(*i*) *Balmanno* v. *Yule*, M. 9062 (1628).

to warrant his mother's liferent, the Court held that she could plead the defence (*a*); but this doctrine was afterwards departed from (*b*).

There are other cases where the rights of the major and minor defenders are so inseparably united that they cannot be disjoined, as where they are co-heirs, or joint proprietors *pro indiviso;* and in these cases, the action against the major must stop till the minor have arrived at majority, if the latter plead his privilege (*c*). If the ancestor, at his death, have conveyed the property to a third party, the plea may still be competently urged, if the heir make up a title to his ancestor and continue the possession; which might be done with the disponee's consent, because in such a case it is *jus tertii* to any other than the disponee to found on the disposition (*d*). A minor may succeed as heir to his mother or grandfather while his father is yet alive, in which case there is no room for this plea. In all cases where it can be pleaded, the father must be dead (*e*).

Who entitled to the privilege.

Minors alone are entitled to this privilege; it never has been extended to any of the other classes of individuals under curatory. But there is no foundation for the limitation of Lord Stair, who says that 'the privilege is chiefly competent to *pupils*.' It is competent to all heirs under majority.

Before the heir can plead the privilege, it is necessary that he produce evidence that he is heir under the investiture of the estate; he must show that he has a title to the subject as it was in the ancestor (*f*). All writers are agreed that the heir must be served to the ancestor, and that apparency is not sufficient (*g*). But Erskine, on the authority of the Regiam Majestatem (*h*), goes further, and holds as another indispensable preliminary to the competency of pleading it, that the minor be also infeft. Bankton, however, says: 'It cannot require infeftment in the person of the heir, where the deceased's title is good without infeftment, as in an

(*a*) *Mar* v. *his Vassals*, M. 9063 (1634).

(*b*) *Borthwick* v. *Skeen*, M. 9064, 1 Sup. 514 (1665); *Yeoman* v. *Oliphant*, M. 9068 (1676). Stair i. 6, 45, par. 8; Bankt. i. 7, 117.

(*c*) Balf. p. 322, c. 4; Bankt. i. 7, 110; Ersk. i. 7, 44. *Pringle* v. *Ker*, M. 9059 (1625); *Lindsay* v. *Cheynes*, M. 9055 (1541).

(*d*) Bankt. i. 7, 112.

(*e*) *Angus* v. *Ker*, M. 9056 (1551).

(*f*) Ersk. i. 7, 44 and 46.

(*g*) *Fleming* v. *Ker*, M. 9070 (1683). Bankt. i. 7, 110; Ersk. i. 7, 44.

(*h*) Ersk. i. 7, 44; Reg. Maj. iii. 32, 3.

adjudication with a charge thereon against the superior; wherefore it is only requisite that the heir make up a title to the right that was in the ancestor: consequently a service in the person of the heir is always necessary, but infeftment is not' (*a*). And this opinion of Bankton seems to be the most consonant with the decisions; for while the privilege was denied to an apparent heir, he has been held entitled to it on being served to his ancestor (*b*). The production of the minor's service will be sufficient to bar the progress of any process of reduction till his majority (*c*). If an heir take the estate, not in the character of heir, but in virtue of a disposition by the ancestor to him, he cannot plead the privilege (even though he would, but for such disposition, have succeeded as heir-at-law), because he has not succeeded to *hæreditas paterna* (*d*).

Evidence taken to lie *in retentis*.

In certain cases, the Court have allowed a proof, in a case delayed through this defence, to be taken to lie *in retentis*, in circumstances where there was danger of losing the evidence by the delay; 'the witnesses being old or in possibility to die' (*e*). The minor must in fact satisfy the production, and the depositions of the writer and witnesses of the deed may be taken to lie *in retentis;* but the debate on the reasons will be delayed till majority (*f*). This rule applies both to ordinary reductions (*g*), and to reductions improbations (*h*).

Does not hold as to collateral succession.

Though the ancient law was otherwise, it has now been quite fixed beyond all controversy, for some centuries back, that it does not apply to collateral succession; and consequently, though the minor were to succeed to the estate of a brother or sister, an uncle

(*a*) Bankt. i. 7, 110.

(*b*) *Fleming* v. *Ker*, M. 9070 (1683); *Pringle* v. *Home*, note in middle of page, M. 9059 (1625).

(*c*) Stair i. 6, 45, 1st and 4th pars.; *Kello* v. *Pringle*, M. 9084 and 9063 (1665).

(*d*) *Yeoman* v. *Oliphant*, M. 9068 (1676); Wal. p. 371, No. 536.

(*e*) *Kello* v. *Pringle*, *infra*, Newbyth's Report.

(*f*) *Anonymous*, 3 Sup. 39 (1674); *Kello* v. *Kinneir*, M. 9066 (1671); *Kello* v. *Pringle*, M. 9063 (1665); *Guthrie* v. *Guthrie*, M. 9069 (1678); *Gordon* v. *Farquhar*, M. 9100 (1685); *Fleming* v. *Fleming*, M. 9105 (1582); *Balmanno* v. *Yule*, M. 9084, 9062 (1628); *Queen's Advocate* v. *Wemyss*, 1 Sup. 115 (1546). Balf. p. 333, No. 8; Ersk. i. 7, 44 *in med.* *Crawford* v. *Crawford*, M. 9085 and 9102, and Robertson's Appeals, p. 28 (1712).

(*g*) *Balmanno*, *supra*, and *Balmerino* v. *Inglis*, 4 Sup. 160 (1694).

(*h*) *Wilkie* v. *Anderson*, M. 9084 (1670); *Guthrie*, *supra*; *Kello*, *supra*; *Fleming*, *supra*; *Queen's Advocate*, *supra*; *Anonymous*, *supra*. See *Ballantyne* v. *Dalziel*, 4 Sup. 287 (1695).

or aunt, he has not the privilege *quoad* the estate acquired (*a*). Even as to some direct ascendants, there is doubt. An estate descending from the father is of course protected. When, however, it has come from a more remote ascendant in the direct line, as grandfather, great-grandfather, etc., there is no express decision finding that this falls within the rule. Stair laid it down that it did. He held that the name *father* comprehends grandfather, great-grandfather, and all predecessors in a direct line, 'who come all under the designation of forefathers, as all successors in the right line come under the name of children' (*b*). He also holds that the rule applies to estates flowing from mothers, and direct ascendants on their side (*c*). The only other writer who refers to the case is Erskine, who offers no opinion, and lays down no rule upon the point, but merely contents himself with narrating what was the opinion of Stair (*d*).

To what property it applies.

III. It only applies to such heritage as is capable of infeftment, —houses, lands, fishings, and others of a like kind, which are *ex sua natura* feudal (*e*). It does not therefore hold as to property which, in contradistinction to executry, is termed heritable, but which, not being feudal, is incapable of infeftment, such as leases however long, bonds secluding executors, and bonds bearing a clause of interest (*f*), nor to sums of money and other mobilia (*g*). But all rights which are *fundo annexa*, and therefore in which the proprietor might be seised, come within the rule, even though they be incorporeal, such as rights of patronage (*h*); and even though the rights be redeemable, they are likewise privileged when the minor's right to them is challenged, if they possess the characteristic of the feudal law, of being capable of being made real by sasine,—bonds and dispositions in security, wadsets, heritable bonds (*i*), adjudications; but this will not protect the minor from being obliged to allow them to be redeemed by the debtor entitled

(*a*) M'Ken. i. 7, 11; Bankt. i. 7, 109; Ersk. i. 7, 43.

(*b*) Stair i. 6, 45, 3d sentence, followed by other writers: M'Kenzie i. 7, 11; Bankt. i. 7, 109; Forbes' Inst. 39.

(*c*) Stair i. 6, 45, 3d sentence.

(*d*) Ersk. i. 7, 43.

(*e*) Stair i. 6, 45.

(*f*) Ersk. i. 7, 44.

(*g*) *Rae* v. *Mans*, 4 Sup. 190 (1694).

(*h*) *Dunkeld* v. *Fletcher*, M. 9099, and stated in *Fleming* v. *Ker*, Mor. 9070 (1683); Ersk. i. 7, 44.

(*i*) Ersk. i. 7, 44; *Balmerino* v. *Inglis*, 4 Sup. 160 (1694); *Davidson* v. *Auldcorn*, M. 9072 (1694).

to do so (*a*). If, however, the title of the minor be *ex facie* irredeemable, the plea is competent to him against the redemption, although in reality it be a redeemable right, but the proof of which is only by extrinsic evidence (*b*). The privilege does not apply to warrandice lands (*c*). Servitudes come within the rule, if they be constituted by infeftment (*d*).

Ancestor must be infeft.

Besides the capability of the heritage being feudalized, it is also essential that the minor show that his ancestor was infeft in the estate (*e*). Erskine has qualified this rule by adding, that the ancestor must be infeft 'in all rights where seisin was necessary to perfect them;' but this qualification is altogether unnecessary, inasmuch as the rule only holds with reference to property where seisin is necessary to perfect them. If an ancestor therefore die, leaving his personal right to the estate unfeudalized, the minor will not be entitled to the privilege: he is bound to plead to any action raised against him, calling in question the right to his estate (*f*). But to this rule there are exceptions: for, first, if the author of the minor's ancestor had been infeft in the estate, and if the ancestor had the estate in his *natural* possession, in virtue of the personal right, the minor would in this case be entitled to his privilege (*g*). But if the minor's father be infeft, it is not necessary that *his* author be so (*h*). Secondly, As there may be various situations where, through unforeseen accidents, the ancestor could not complete his title during his life, it would be hard on this account to deny to his minor heir a privilege which, but for such accident, he would have enjoyed. Wherefore it is, that if the minor's ancestor have

(*a*) *Craig* v. *Strang*, M. 9076, Elch. *v. Minor non tenetur*, No. 3 (1749). See the various *rationes* of the Court. See *Douglas* v. *Inglis*, 5 Sup. 738 (1744); *Macfarlane* v. *Hume*, M. 9086 (1797); *Forous* v. *Gourlay*, M. 9082 (1593); Ersk. i. 7, 45 *ad fin.*

(*b*) *Craig* v. *Strang*, M. 9076, Elch. *v. Minor non tenetur* 3 (1749); *Douglas* v. *Inglis*, M. 9073, 5 Sup. 738, Elch. *v. Minor non tenetur* 2 (1744).

(*c*) *Davidson* v. *Auldcorn*, M. 9072 (1694).

(*d*) *Invercauld* v. *Farquharson*, Elch. *Minor non tenetur* 1 (1735).

(*e*) *Guthrie* v. *Guthrie*, M. 9069 (1678), Stair; *Kello* v. *Pringle*, Mor. 9063 (1665); *Invercauld*, *supra*. Reg. Maj. iii. 32, 3; M'Ken. i. 7, 11; Bankt. i. 7, 16; Ersk. i. 7, 44.

(*f*) Cases and authorities as in (*e*); Stair i. 6, 45, par. 6.

(*g*) *Pringle* v. *Ker and Home*, Mor. 9059 (1625); Bankt. i. 7, 110; Ersk. i. 7, 44 *in med.* See *infra* for the nature of the possession here required, p. 448.

(*h*) *Chapman* v. *White*, M. 9066 (1667); Stair i. 6, 45, par. 6.

adopted all the means in his power to obtain himself infeft, the minor will be entitled to plead the defence, although the infeftment might not have been obtained. If, for example, he had charged the superior to give him an entry, but had not obtained a charter before he died, such charge is held in this question to be equivalent to actual sasine (*a*).

The ancestor is not held divested of the property so as to bar this defence, when he has granted an heritable security over it, by virtue of which the creditor is in possession on an action of maills and duties, because, notwithstanding of such security, the ancestor still remains proprietor; this being nothing more than a burden upon his right (*b*). The property which the minor himself may acquire by singular title, purchase, donation, etc., is not entitled to the privilege. But conquest in the person of the father is, since it is property to which the minor *succeeds*, and therefore heritage as to him (*c*).

In what cases is the privilege excluded or barred?

IV. The privilege extends only to such actions as are calculated to evict from the minor his inheritance. There have been many decisions pronounced in regard to cases which do not come within this description. These are of a very various character, incapable of being reduced to distinct classes, and shall therefore now be detailed without any attempt at classification or division.

Possessory actions. Proving the tenor.

Actions which proceed upon the assumption that the minor has a right to the estate, and the object of which is to have the precise extent of his property ascertained, so that he may not encroach upon that of his neighbours, or to have a property which he formerly held with others divided, cannot be barred by this defence (*d*). It appears that in the turbulent reign of David the Second, actions of perambulation of lands were incompetent against minors, apparently on the ground that they resolved into declarators of property (*e*), but Sir George Mackenzie (*f*) doubted the propriety of this rule, and the later law has receded from the enactment; the rule now being that actions for settling the boundaries of lands (*g*),

(*a*) *Fleming* v. *Ker*, M. 9071 (1683, Sir P. Home's Report); Ersk. i. 7, 44.

(*b*) *Douglas* v. *Inglis*, Mor. 9073, 5 Sup. 738, Elch. *v. Minor non tenetur* 2 (1744).

(*c*) *Pringle* v. *Ker and Home*, M. 9059 (1625); *Fleming* v. *Kilconquhar*, M. 9070 (1683). Reg. Maj. lib. iii. c. 32, No. 4; Balf. p. 334, c. 14; M'Ken. i. 7, 11; Bankt. i. 7, 109; Ersk. i. 7, 44.

(*d*) Ersk. i. 7, 45.

(*e*) David II. c. 20, s. 9.

(*f*) M'Ken. Obs. on 1587, c. 42.

(*g*) *Robertson* v. *Stuart*, M. 9097

actions of molestation *in possessorio* (*a*), and all actions, in short, whose object is to regulate the *possession* of the lands (*b*), may be brought against a minor. So also may actions for compelling exhibition of writs, because they have no effect either in the impairing or carrying away the minor's heritage (*c*). In like manner, actions of proving the tenor of writs may competently be insisted in against a minor; and this because the minor is put in no worse situation than he would have been in, but for the accidental loss of the writ sought to be proved (*d*). But the plea of *minor, etc.*, would exclude process upon the writ so proved (*e*).

Actions by superior against minor vassal.

The defence cannot be pleaded against actions which arise either from feudal casualties or delinquencies, though instituted by the superior to deprive the minor of his heritage, such as a declarator of non-entry (*f*), reductions *ob non solutem canonem* (*g*); recognition, purpresture, and the other feudal casualties of the old law (*h*); because the basis of all such actions is, a recognition of the minor's right as the pursuer's vassal; and the action cannot properly be considered so much an action for evicting the minor's heritage, as the means afforded to the superior for recovering the feudal casualty with which the property is burdened in his favour. If the minor found upon his father's infeftment, he must take it with its qualities; and, therefore, if the minor's infeftment or its warrant had acknowledged any party as superior of the lands, he could not object to any process brought at the superior's instance for the casualties of superiority, seeing that he cannot plead against his own right (*i*).

Where the action was raised during ancestor's life.

Although the action be one for evicting the minor's heritage, it may competently be insisted in against him, if it had been com-

(1675); *M'Kenzie* v. *M'Kenzie*, M. 9100 (1710). Bankt. i. 7, 114; Stair i. 6, 45; Ersk. i. 7, 45.

(*a*) M'Ken. Obs. 1587, c. 42; Stair i. 6, 45; M'Ken. i. 7, 11.

(*b*) M'Ken. *supra*; Ersk. *supra*; Balf. p. 334, c. 13, and p. 333; correct Stair i. 6, 45, 4th sentence. But see *Falconer* v. *Kinneir* (1684), M. 1766.

(*c*) *Gordon* v. *Gibson*, M. 9086 (1714); *Fleming* v. *Fleming*, M. 9082 and 9105 (1582).

(*d*) *Jedburgh* v. *Home*, M. 9083 and 16086 (1628).

(*e*) Stair i. 6, 47, par. 7 *ad fin.*

(*f*) *Douglas* v. *Inglis*, M. 9073, 5 Sup. 738, Elch. *v.* Minor, etc., No. 2 (1744).

(*g*) *Maddertie* v. *his Vassal*, M. 9096 (1613); Stair i. 6, 45, par. 7.

(*h*) *Hepburn* v. *Yule*, M. 9096 (1610); *Dun* v. *Scott*, M. 9098 (1681).

(*i*) *Hepburn* v. *Yule*, *ibid.* Stair i. 6, 45, par. 8; M'Ken. i. 7, 11; Bankt. i. 7, 114; Ersk. i. 7, 45.

menced against his ancestor during his life, according to the rule, *Actio contra defunctum cœpta, continuatur in hæredes.* This rule applies in several other cases, where, though the right of action be competent against the ancestor, it is absolutely denied against his heir, unless litiscontestation have taken place during the ancestor's life (*a*); and, *a fortiori*, it should apply to a case like this, where the action lies against the heir at common law, but is barred merely by his temporary privilege (*b*).

Actions to compel implement of obligations. Irritancies. Donations.

In consequence of the principle, that the defence is incompetent where the minor's right is acknowledged by the pursuer, it cannot be pleaded against an action brought to compel implement of any deed granted by the predecessor, whereby he became bound to convey that right; because, in such a case, the question is not *in placito* against the minor, but *in executione rei judicatæ:* there is no competition of rights (*c*). On this principle, also, the plea would not be a competent defence against an adjudication led for a debt due by the minor's ancestor (*d*). Erskine requires that the ancestor's obligation should be 'liquid;' but this requisite is not mentioned in the other authorities. The privilege would not be competent against a conventional (*e*) or legal (*f*) irritancy. Under this head may also be placed another case, where the minor succeeds to a right which the ancestor only possessed conditionally. Such is a donation by one spouse to another, which the donor is not barred from revoking, after the subject granted has, by the donee's death, fallen to his or her minor heir (*g*).

Where both parties to the action are minors.

Where two minors are opposed to each other, the rule still applies, although some think otherwise, from the maxim that

(*a*) See examples, *Mollison* v. *Murray*, 19 Dec. 1833, 12 S. 237; *M'Turk* v. *Greig*, 2 July 1830, 8 S. 995.

(*b*) Ersk. i. 7, 45; *Dunfermline* v. *Crichton*, M. 9090 (1574); *Yeoman* v. *Oliphant*, M. 9097 (1676); Balf. p. 333, c. 11, and cases cited by him; M'Ken. i. 7, 11; Ersk. i. 7, 44.

(*c*) *Ormiston* v. *Calder*, M. 9092 (1582); *Hamilton* v. *Cambuskeith*, M. 9094 (1583); *dictum* in *Macfarlane* v. *Hume*, M. 9086 (1797). Stair i. 6, 45, par. 7; Elch. Annot. p. 35; Bankton i. 7, 113; Ersk. i. 7, 45.

(*d*) Ersk. *ibid. in med.*; Balf. p. 334, c. 13; Wal. pp. 374–5; Reg. Maj. iii. 32, 16; *Pitsligo*, 17 June 1562, reported by Skene, Note ad Reg. Maj. s. 16; *dictum* in *Macfarlane*, *supra*.

(*e*) *Inchaffrey* v. *Mitchell*, M. 9096 (1624).

(*f*) *Lennox* v. *M'Moran*, M. 9097 and 6435 (1633).

(*g*) *Gordon* v. *Maxwell*, M. 9085 and 6144 (1678). Fraser, Pers. and Dom. Rel. vol. i. p. 497.

privilegiatus contra privilegiatum suo non utitur privilegio (*a*). There is, however, one exception to this rule; for it has been decided that an action of reduction on the head of minority and leison, at the instance of a major, of deeds executed by him during his minority, cannot be stayed by this plea (*a*). In former times, when 'the kirk, quhilk is understuid ever to be minor' (*b*), instituted an action against a minor, it could not be stayed by this defence (*c*).

Where ancestor had lost the possession, or committed dole, etc.

The plea is incompetent where the minor's ancestor had lost the lawful and peaceable possession of the estate at the time of his death (*d*). And the possession here indicated would be held as enjoyed if maintained for seven years, the time required to ground a possessory judgment (*e*), though the matter is 'at the discretion of the judge' (*f*). It is also incompetent when the minor is sued upon his ancestor's fraud or delict (*g*). Of this kind of title are dispositions by interdicted persons, without consent of the interdictors, obtained by the ancestor (*h*). As all actions of reduction improbation proceed on the head of forgery or fraud, the plea is not heard against them when there is any specific ground of fraud or dole libelled on; but it is in all cases where the general clause calling for the annulling the rights is merely put in, to force production of them (*i*). It is held dole on the part of the minor's ancestor, if he take a conveyance to a subject from a person inhibited, and consequently the minor has no privilege as to such property (*k*). It would appear to be doubtful whether the ances-

(*a*) *Rosyth*, M. 9106 (1619); and see the same principle sanctioned, *Lyell* v. *Dones*, M. 9106 (1680). Balf. p. 333, c. 12; Reg. Maj. l. 3, c. 34; Stair i. 6, 35; Ersk. i. 7, 46 *in fin.*

(*b*) Balf. p. 333, c. 12.

(*c*) *Newbottle* v. *Tenants*, M. 9104 (1580); *Murray* v. *Learmont*, M. 9104 (1547); *Murray* v. *St Andrews*, M. 9104 (1546).

(*d*) Stair i. 6, 45, 4th sentence; Ersk. i. 7, 44.

(*e*) Bankt. i. 7, 116.

(*f*) Bankt. *ibid.*

(*g*) *Queen's Advocate* v. *Wemyss*, M. 9089 (1546), and 1 Sup. 115. In this case there is a short note of a judgment to the same effect against Queen Mary, who proponed the defence, which was repelled. *Seton* v. *Cockburn*, M. 9089 (1548); *Drumquhasil* v. *Cuningham*, M. 9094 (1693); *Sanquhar* v. *Johnston*, M. 9096 (1610); *Crawford* v. *Crawford*, M. 9102, and Robertson's Appeals 28 (1711); *Macfarlane* v. *Hume*, M. 9086 (1797). Balf. p. 333, c. 8; Dirl. and Stew. p. 289; Stair i. 6, 45, par. 8; M'Ken. i. 7, 11; Ersk. i. 7, 45.

(*h*) *Scott* v. *Kincaid*, Mor. 9091 (1581).

(*i*) *Sanquhar*, *supra*; *Crawford* v. *Crawford*, M. 9085, 9102, Robertson's Appeals 28 (1610).

(*k*) *Elphinston* v. *Salton*, M. 9095 (1607). But see *contra*, *Davidson* v.

tor's having obtained a deed by force, would be an equally valid ground for denying to his minor heir this privilege (*a*). Where the pursuer was wrongfully forfeited of his property, which was given to the minor's ancestor, the defence was repelled (*b*). The privilege cannot be founded on by a minor when he has himself provoked the discussion, as by instituting actions, to support which he is obliged to found upon his title (*c*). Nor does it protect him in a right to retain warrandice lands, when other lands, sold by the minor's ancestor, have been evicted, and for which the former were granted in warrandice (*d*); nor in any other process for making good the purchaser's right (*e*).

Intrinsic nullity in minor's title. Patronage. Terce.

When the ancestor's title labours under any intrinsic nullity, which can be competently stated by exception or reply, the rule will not apply, because, as any infeftment on such a deed will be null, there can be no *hereditas* (*f*), seeing that the pursuer can insist in a petitory action without taking any notice of the minor's title (*g*). The minor's ancestor, in short, must have an *ex facie* unchallengeable title (*h*). Balfour states another exception to the operation of the principle in these words: 'Ane minor within age is halden to answer, in actiounis concerning the richt of patronage, viz. quhen ony questioun arisis anent the last presentatioun, and quhidder he that was last presentit, was lauchfullie presentit or not' (*i*). The plea forms no competent defence against the widow's claim for her terce (*k*).

Auldcorn, M. 9072 (1694), and Erskine's commentary on it in Ersk. i. 7, 46 *in fin.*

(*a*) See Bankton, and cases cited by him, i. 7, 115.

(*b*) *Hamilton* v. *Gaston*, Mor. 9055 (1546).

(*c*) *Dones* v. *Lisle*, 2 Sup. 10 (1681); *Dunkeld* v. *Aberlady*, Mor. 9099 (1682).

(*d*) *Davidson* v. *Auldcorn*, M. 9072 (1694); *Bonar* v. *Lyon*, M. 9099 and 16606 (1683).

(*e*) *M'Kenzie* v. *M'Kenzie*, Mor. 9100 (1710).

(*f*) *Donaldson* v. *Donaldson*, M. 9080, 5 Sup. 236; Elch. *v.* Blank Writ 2 (1749). See *Brown* v. *Rule*, 4 Sup. 521 (1702); Bell's Prin. s. 2103.

(*g*) Elch. Notes on Stair, p. 35.

(*h*) *Tomison* v. *Tomison*, 27 Feb. 1840, Jur.

(*i*) Balf. p. 334, c. 16.

(*k*) Balf. p. 335, c. 18; Quon. Attach. c. 99; Bankt. i. 7, 111; Reg. Maj. ii. 16, 66.

PART FOURTH.

PRO-TUTORS, PRO-CURATORS, FACTORS LOCO TUTORIS, AND CURATORS BONIS.

CHAPTER I.

PRO-TUTORS AND PRO-CURATORS.

BESIDES tutors and curators, there are yet another class of guardians known in law, under the name of pro-tutors and pro-curators. These are parties who, without any title to the office of tutor or curator, act as if they were legally appointed to these offices, and hold themselves out as possessing the characters they unwarrantably assume. They are therefore said to be in the place of tutors—*pro-tutors, pro-curators* (*a*). The nature of the circumstances which will be regarded as amounting to an assumption of the office is illustrated by decision. A widow was held to have acted as pro-tutor for her children, by applying to the magistrates of the town to have the property belonging to her children inventoried and appraised; and she proceeded a certain length in getting herself confirmed executrix *qua* relict: she disposed of the goods on hand; uplifted the debts due to the defunct, and paid those due by him; and in some of these transactions she was designed manager of her deceased husband's affairs. She also uplifted bonds in which she had no pretence of a common interest arising from her *jus relictæ*. In these circumstances, the Court held her to have assumed a character equivalent to that of tutor, and so liable in the obligations

(*a*) Stair i. 6, 12; Bankt. vol. i. p. 168; Ersk. i. 7, 28; Bell's Prin. 2098; Bell's Dict. *v.* Pro-tutors.

incumbent on a pro-tutor (*a*). The doctrine of this case was sanctioned by former decisions (*b*).

Cases similar to that now mentioned are the most common illustrations of pro-tutory and pro-curatory. But many others may be instanced. Thus, parties believing themselves to be tutors or curators, but in reality having no valid title, though acting as if they had; or parties who knew they had no title (*c*), or who were debarred from the office by lying under some legal impediment or disability, as being under the age of twenty-five in the case of tutory-at-law (*d*); or parties who, having been tutors, but had ceased to be so, such as a female tutor after her marriage; or an outlaw (*e*), or a tutor who has not found caution, though he has accepted and taken the oath *de fideli;* or a tutor or curator not making up an inventory as required by statute (*f*);—all these are pro-tutors or pro-curators.

The Court have recently held, that persons to whom the executor of a deceased father, with consent of the widow, disponed the whole estate in trust for her and the children, and who intromitted with the estate, and examined and docqueted the executor's accounts of his intromissions, were not in the position of pro-tutors or pro-curators (*g*); and the Court consequently refused to subject them in liability for omissions as well as intromissions. 'The particular ground of liability in point of law on which the pursuers rest this part of their case, seems to me to have no application at all. It is said that these gentlemen were in the position of pro-tutors. This is founded on a misconception of the rule of law, which subjects pro-tutors to exact diligence for omissions as well as intromissions. A mere intromission with the share of the funds of the defunct which belongs to his children does not constitute pro-tutory; and there can be no better authority for this than Lord Kilkerran in *Fowler* v. *Campbell:* "It is not every management of the affairs of a pupil that will infer a pro-tutory, but only such as is *qua* tutor,

(*a*) *Fowler* v. *Campbell*, M. 16343, Elch. *v.* Tutor 11 (1739).

(*b*) *Muir* v. *Crawford*, M. 16316 (1697); *M'Duff* v. *M'Duff*, M. 514 (1637).

(*c*) Ersk. i. 7, 28; Stair i. 6, 12.

(*d*) Dig. xxvii. 5, 1.

(*e*) *Vallange* v. *Kincaid*, M. 513 (1630).

(*f*) *Cass* v. *Ellies*, M. 3504 (1671); *M'Duff* v. *M'Duff*, M. 514 (1637).

(*g*) *Fultons* v. *Fulton and Others*, 21 March 1864, 2 Macph. 893.

that is, where one acts under the character of tutor when he is not; for the Act of Sederunt, June 24, 1665, did no more than adopt the civil law into ours"' (*a*).

There may even be pro-tutors and pro-curators, although there be legal tutors and curators discharging the duties of these offices. Any person indeed is so, who assumes the office of tutor or curator without the title, though he act with others whose appointment is unchallengeable; although it was contended that the reason of the rule fails here, seeing that there could be no vitious intromission where there are others validly appointed (*b*).

Where the minor has passed pupillarity, and his former tutor continues to act, he is then not to be regarded as a pro-tutor, but as a pro-curator. And where the minor has attained to his majority, and his curators continue to intromit after that event, they are not to be regarded as pro-curators, because there is no person in minority; they are then *negotiorum gestores*, with liabilities of a nature entirely different. A person, in short, can be a pro-tutor or pro-curator in those cases only where the minor can have a tutor or curator (*c*).

Powers of pro-tutors and pro-curators.

Parties acting as pro-tutors or pro-curators are not favourites of the law. The want of any legal title makes their intromission be regarded as a wrong done to the minors, seeing that they proceed to intromit with the property of their ward, without giving the guarantees for their honest administration, which the law, by exacting caution and enforcing the preparation of inventories, demands from ordinary tutors and curators. Hence the rule, that pro-tutors and pro-curators cannot insist *activé* in any one of the duties of the offices they have usurped (*d*). They have no right to sell or give away any part of the minor's heritage or moveables; and if they do so, their act of sale or gift is null, though a *bona fide* onerous purchaser may be thereby prejudiced (*e*). They have no right to institute actions in the minor's name, or to call up the minor's debts (*f*); and if a debtor pay to them, he is not discharged from the claim, unless he show that the payment was applied to the minor's

(*a*) *Per* L. J.-C. in *Fulton* v. *Fulton*.

(*b*) *Cass* v. *Ellies*, *supra*.

(*c*) Dig. xxvii. 5, 1; *Cass* v. *Ellies*, M. 3504 (1671); Elch. Annot. p. 34.

(*d*) Arg. *Cass* v. *Ellies*, M. 3504 (1671); *Swinton* v. *Notman*, M. 16273 and 16269 (1665). Ersk. i. 7, 28.

(*e*) Dig. xxvii. 5, 2; Dig. xxvi. 7, 47, 3; Dig. xxvii. 10, 8, Pr.

(*f*) Code v. 45, 2; Ersk. i. 7, 28.

benefit (*a*). Lord Stair however holds, that to this rule of strict law there is an exception in equity; for 'if the person had been long holden and repute tutor, the deed would likely be sustained, unless annulled because of the pupil's lesion' (*b*). The general rule was applied in a late case, where a discharge granted by persons in the capacity of tutors, after their office had expired, was declared null; and they were held bound to relieve the parties to whom it had been granted, of all the liabilities incurred through the transaction (*c*).

Liabilities of pro-tutors and pro-curators.

Pro-tutors and pro-curators, though they have none of the powers of tutors and curators, are rendered liable as if they had them. In other words, they are liable not only for their actual intromissions, but also for their omissions. If they neglect to pursue a debtor *vergens ad inopiam*, and the debt be lost thereby, they are bound to pay it, notwithstanding that, if they had instituted an action for the purpose, it would have been a valid defence to the debtor that they had no title to pursue (*d*). If they neglect to lend out the minor's money, they are liable in interest (*e*). And, in short, if they fail in using the same diligence that an ordinary tutor is bound to use according to the rules already stated (*f*), they are liable for all loss and damage which their negligence may have caused. *Qui pro tutore negotia gerit, eandem fidem et diligentiam præstat quam tutor præstaret* (*g*). This doctrine has been expressly declared by Act of Sederunt of 24th June 1665, which declares that whatsoever persons should, in time coming, intromit with the means and estate of any minor, and should act in his affairs as pro-tutors, having no right of tutory or curatory established in their persons, they should be liable as well for what they might have intromitted with as if they had been tutors and curators, as for what they should intromit with *de facto*, in the same manner as tutors and curators are liable by the law and practice of this kingdom. The rule of law, declared by the Act of Sederunt, has been since invariably recognised (*h*). 'It is a familiar maxim in

(*a*) Dig. xlvi. 3, 14, 2; Dig. xlvi. 3, 34, 4; Ersk. i. 7, 28; *Allan* v. *Hamilton*, M. 5654 (1715).

(*b*) Stair i. 6, 12.

(*c*) *Lockhart* v. *M'Kenzie's Trs.*, 15 Dec. 1826, aff. 24 June 1829, 3 W. S. 481.

(*d*) Ersk. i. 7, 28.

(*e*) Ersk. *ibid.*

(*f*) *Supra*, p. 298 *seq.*

(*g*) Dig. xxvii. 5, 4.

(*h*) *Fowler* v. *Campbell*, M. 16343, Elch. v. Tutor 11 (1739); *Cass* v. *Ellies*, M. 3504, 16285 (1671).

the law, that a pro-tutor or pro-curator is liable in even stricter diligence than the tutor or curator with a legal title' (*a*). Further, pro-tutors and pro-curators cannot be *auctores in rem suam* (*b*). And all eases given by the creditors of the minor of debts paid by the pro-tutor, cannot be appropriated by the latter to his own use, but must be allowed to his ward (*c*).

Time at which the liability begins.

The liability of pro-tutors commences from the time of their intromission with the minor's property, and not from the time at which they might have intromitted—the death of the minor's father (*d*). But in the accounting with him this rule is to be observed, that if the entry upon the office be at a short interval after the father's death, the pro-tutor must account for the whole property which the father left; it not being presumed, from the short space, that any of it had gone amissing. On the other hand, if the distance of time between the death and the intromission be considerable, the minor must instruct the exact amount of property he possessed; and more especially, he must show that those things which perish by the use were extant when the pro-tutor began his intromissions (*e*).

Must account at any time when called on.

The ordinary privileges of tutors and curators are, along with their powers of active administration, denied to pro-tutors and pro-curators. Hence the latter have not the privilege, enjoyed by the former, of not being obliged to count and reckon till the office is at an end; for they may be called upon by the minor at any time to account, and to resign their administration. *Cum eo qui pro tutore negotia gessit etiam ante pubertatem agi posse, nulla dubitatio est; quia tutor non est* (*f*). In this accounting they are entitled to credit for all sums disbursed profitably on the minor's account; and in this respect they may be said in some measure to possess an active title (*g*). But this is an active title to recover their own property, not that of the minor (*h*).

(*a*) *Per* Lord Kinloch in *Fultons* v. *Fulton and Others*, *supra*.

(*b*) *Tolquhoun* v. *Thoirs*, M. 16305, 2753 (1683).

(*c*) *Tolquhoun* v. *Thoirs*, M. 16308 (1686).

(*d*) Ersk. i. 7, 28; *Muir* v. *Crawford*, M. 16316 (1697).

(*e*) *Muir* v. *Crawford*, *ibid.*

(*f*) Dig. xxvii. 5, 1, 3; Dig. xxvi. 7, 26; Ersk. i. 7, 28.

(*g*) Ersk. i. 7, 28.

(*h*) Dig. xxvii. 5, 1, 5; Dig. xxvii. 4, 1, 1; *Gray* v. *Irving*, M. 8927 (1692).

CHAPTER II.

FACTORS LOCO TUTORIS AND CURATORS BONIS.

THE formalities necessary to the constitution of the offices of tutory and curatory are of such a nature, that they frequently form obstacles to the appointments of parties qualified for their duties; and the strict rule of law which prohibits any charge being made by tutors for services, however diligent and long continued, deters persons nominated from running the risk of incurring any of the heavy responsibilities of a guardianship which may extend over a long minority. Hence the origin of factors *loco tutoris* and *curators bonis*. Where no testamentary tutors are appointed by the father, or where the party entitled to serve tutor-at-law to a pupil or a person insane will not do so, or where none of the relations take out a tutory-dative from the Crown, there would be a class of the community left without protection, in circumstances where of all others protection was needed, had it not been for the origination of a new officer appointed by the Supreme Court of Equity, and induced to labour by receiving remuneration for his service. 'I like factors *loco tutoris*,' said Lord Auchinleck, 'for they serve for hire, and consequently better than those who serve for conscience sake' (*a*).

Right of the Court of Session to name such officers.

It has been said that the power of naming judicial factors originally belonged to the Scotch Privy Council, and was only assumed by the Court of Session on the abolition of the Privy Council at the union of the two kingdoms (*b*); and in a late case, it was thought that the earliest instance of the power being exer-

(*a*) Hailes 360.

(*b*) Interlocutor in *Bryce* v. *Graham*, 25 Jan. 1828, 6 S. 430; H. of L. 23 July 1828, 3 W. S. 323. Bell's Dict. *v.* Judicial Factor; Darling's Practice, p. 683.

cised by the Court of Session was in 1708, one year after the Union (*a*). There are, however, glimpses of it at a much earlier period (*b*); and what is stated as to the Privy Council does not seem to be borne out by any of the manuscript records of their proceedings in the Advocates' Library. Instances occur of their controlling guardians in their management; but no case has been observed where they ever appointed a judicial factor or *curator bonis*, having powers and duties similar to that class of officers now.

It was once thought that the power assumed by the Court of Session in this matter trenched upon the privileges of the Crown and the jurisdiction of the Court of Exchequer (*c*). But in every case where the Court have had occasion to express a deliberate opinion on the subject, they have asserted their jurisdiction. They have held themselves entitled and bound to watch over the persons and estates of pupils and the insane, as being the Supreme Court of Equity in the country, although they have never gone the length of the English Court of Chancery, of rendering the *persona incapax* a ward of Court (*d*). The appointment of such officers now forms almost the daily duty of the Court; and the extent to which this sort of guardianship has been resorted to, may be gathered from a statement of the Lord President in a case in 1834, to the effect that these judicial factors had property under their management to the value of eight millions (*e*).

The number and importance of these factories, together with the imperfection and insufficiency of existing regulations for preventing in many instances the occurrence of great irregularity in the conduct of such factors, led in 1851 to the passing of an Act of Parliament (*f*), by which stringent regulations were introduced for their proper conduct; and the general superintendence of such factories was entrusted to an accountant of Court vested with large powers of surveillance. Under the working of this Act, a gradual

(*a*) *Somerville's Factor*, petr., 6 Feb. 1836, 14 S. 451. See the case referred to, *Lin*, 30 June 1708, 5 Sup. 50.

(*b*) *Maxwell* v. *Sharp*, in Robertson Appeals, p. 380, case in 1688, and *Carmichael*, M. 7454 (1700).

(*c*) *King's College of Aberdeen* (1741), Elch. No. 11, v. *Trust*, and Notes, p. 215.

(*d*) *Dicta* in *Bryce* v. *Graham*, *supra*, and in *Somerville's Factor*, *supra*.

(*e*) *William Bell*, petr., 7 March 1834, 12 S. 531.

(*f*) 12 and 13 Vict. c. 51.

improvement has been effected in the regularity with which factors account, and great security has been afforded for the preservation and proper management of the large amount of property administered.

When may factors be appointed, and to whom.

I. Factors *loco tutoris* and *curators bonis* are necessary where the guardians formerly in the management have failed, or have declined, or are unfit to act, or have been removed from office (*a*), or have resigned (*b*). Where an application has been made to the Exchequer for a gift of the property of a person deceased which has fallen to the Crown, it is doubtful if the Court of Session can appoint a *curator bonis* to take the management of the property while the application is pendent. The Court of Exchequer formerly, and now the Lord Ordinary in Exchequer, would regulate the matter (*c*). In the general case, the Court will not appoint a factor or curator where the party is already under guardianship proper; and it will be a necessary preliminary to a new appointment, that the tutors or curators in the management be removed. Accordingly, the Court refused to appoint a factor *loco tutoris* where the father had named tutors and curators, and it did not appear that they had declined to accept (*d*). It was also doubted whether such an appointment was competent where there was an executor confirmed and entitled to administer the moveable estate (*e*). But a different rule would hold where the validity of the appointment was disputed (*f*).

Without any formal exclusion of the father's legal right of administration, a factor *loco tutoris* was appointed to his children, as he was an undischarged bankrupt, and had no settled domicile (*g*);

(*a*) *Donaldsons*, petrs., M. 16364 (1776); *Dishington* (1758), M. 8913; *Wotherspoons* (1775), M. 16372; *Cowan* (1788), M. 7452; *Weir* v. *Prentice*, 27 June 1829, 7 S. 805; *Craigie*, petr., M. 7455 (1758); *Johnstone* v. *Wilson*, 11 July 1822, 1 S. 558; *Robertson* v. *Lamb*, 11 March 1829, 7 S. 573, and all the cases following; *Hadden* v. *Barr*, 27 Feb. 1822, 1 S. 357; *M'Intyre*, 21 Dec. 1850, 13 D. 951.

(*b*) *Munnoch*, petr., 15 S. 1267.

(*c*) *Scott*, petrs., 28 Jan. 1823.

(*d*) *Morrison*, petr., 1770, Hailes 359.

(*e*) *Grant* or *Murray* v. *Murray*, 2 Dec. 1847, 10 D. 194.

(*f*) *Barwick*, 17 D. 308.

(*g*) *Johnstone* v. *Wilson*, 11 July 1822, 1 S. 558. See *Walton*, 12 D. 912, where the Court did not appoint a factor, but a tutor *ad litem*, to children. More recently the Court appointed a *curator bonis* to a minor, but refused to remove father from the office of administrator-at-law. *Robertsons*, 12 July 1865, 3 Macph. 1077.

also on the father's petition where a conflict of interests might arise between him and his son (*a*); and a *curator bonis* has been appointed in order to call another curator to account (*b*). Where the property is already in the hands of trustees, this will form no bar to the appointment of a judicial factor or *curator bonis*, although the entire funds be possessed by the trustees, as the factor might be serviceable to the ward in superintending the trust management, and calling the trustees to account (*c*); and although a tutor-at-law, by serving to that office, supersedes a factor *loco tutoris*, yet the Court will appoint the latter *hoc statu*, although the tutor-at-law state that he intends to serve (*d*).

Estate must be of some value to justify the appointment.

An estate should be of such value as to call for the appointment of a curator. In one case, where the curator appointed obtained powers to make up the ward's titles to heritage, there remained in his hands, after paying all expenses, the sum of 23s. He obtained authority to pay over this balance to the inspector of poor, but the Court intimated an opinion that no curator ought to have been appointed (*e*).

Curators appointed to minors above pupillarity.

Again, where minors above pupillarity ask the Court for a guardian, the latter is termed a *curator bonis*. There is here no absolute necessity for the interference of the Court, as the minor may elect curators to himself (*f*). Accordingly, applications for the appointment of a *curator bonis* to a *minor pubes* have in various cases been refused (*g*); and although the minor were abroad, the Court would only apply the same remedy to such a case as to a person of full age in the same circumstances, namely, to appoint a factor *loco absentis* (*h*). Where, of a number of children, some are minors *puberes* and some pupils, the proper course is for the minors to choose a curator, and the party so selected is usually

(*a*) *Buchan* v. *Harvey*, 21 Dec. 1839, 2 D. 275; *Sawers*, 9 March 1850, 12 D. 906; *Mann*, 19 July 1851, 14 D. 12.

(*b*) *Mackenzie*, 21 Jan. and 7 Feb. 1845, Jur. and 7 D. 283.

(*c*) *Dalrymple* v. *Ranken*, 25 June 1836, 14 S. 1013; *Robertson* v. *Lamb*, 11 March 1829, 7 S. 573. See *Cowan* v. *Turnbull's Trs.*, 13 June 1845, 7 D. 872.

(*d*) *Weir* v. *Prentice*, 27 June 1829, 7 S. 805; *Barwick*, 27 Jan. 1855, 17 D. 308.

(*e*) *Dunbar*, 7 March 1848, 10 D. 866. But see *M'Gruther*, 27 Feb. 1835, 13 S. 569; and *Miller*, 26 Nov. 1836, 15 S. 147.

(*f*) *Supra*, p. 354 *seq.*

(*g*) Ersk. i. 7, 10; *Bannatyne*, 19 May 1827, 5 S. 684; *Maclean*, 29 Jan. 1834, 12 S. 355.

(*h*) *Maclean*, *ibid.*

appointed afterwards by the Court factor *loco tutoris* to the children in pupillarity (*a*); though there are cases where, in such circumstances, he was appointed at once curator to the minors and factor *loco tutoris* to the pupils, notwithstanding that there was no speciality preventing the minor's election of curators in the ordinary way (*b*). In a later case, however, the Court intimated that minors could not have judicial factors appointed to them unless special cause was shown why they should not choose curators for themselves (*c*); and that part of the petition was allowed to be withdrawn. From the special circumstances of the cases in which the Court have since allowed such a combined appointment, it would seem that the smallness of the estate, rendering it desirable to avoid expense, is the only circumstance to which the Court gives effect (*d*).

There are, moreover, cases where the Court will without difficulty appoint a *curator bonis* to a *minor pubes*. They will do so where the child is illegitimate, and consequently has no legal next of kin to summon to his election of curators, in terms of the statute 1555, c. 35 (*e*). It was formerly held that such an appointment might be made to a minor although legitimate, if he had no relations on the father's side (*f*), or on the mother's (*g*); or if they be out of the country, and where, consequently, if he proceeded to the election of curators, he would require a dispensation from the Court (*h*). The Court, however, in two later cases, went back upon

(*a*) *Peacock and Others*, 10 June 1837, 9 Jur. 528; *Johnstone*, 15 June 1839, 1 D. 1030.

(*b*) *Watson*, 6 Feb. 1827, F. C.; *Johnstone*, 15 June 1839, 1 D. 1030; *Paton* or *Dow*, 25 Nov. 1847, 10 D. 148; *Ross*, 17 July 1846, 8 D. 1219; *Wood and Others*, 19 July 1849, 11 D. 1494; *Arnot*, 15 Dec. 1849, 12 D. 912, on the ground of saving expense; *Irvine*, 13 Nov. 1850, *ibid.*; *Paterson*, 2 March 1850, *ibid.*; *M'Kinnon*, 12 July 1851, 14 D. 12. In two later cases also, by the Second Division: *Davies* or *Carter*, 21 Jan. 1857, 19 D. 286; and *Simson*, 17 Nov. 1860, 23 D. 35.

(*c*) *Matthew*, 5 Dec. 1851, 14 D. 312; applied in *Eaton*, 2 Feb. 1853, 2 Stu. 192.

(*d*) *M'Whirter*, 13 Feb. 1852, 14 D. 761, 1 Stu. 441; *Mayne*, 11 March 1853, 15 D. 554; *Accountant of Court* v. *Buchanan*, 3 March 1854, 16 D. 717.

(*e*) *Reid*, 10 July 1839, 14 F. C. 1058, note; *Wood*, 31 May 1834, 12 S. 663; *Young*, 19 Feb. 1818, F. C.; *Ogilvy*, 2 March, and *M'Neill*, 8 March 1849, 11 D. 1029 and 1030.

(*f*) *Roberts*, 11 July 1839, 14 F. C. 1059, note; *M'Lellan*, 25 Nov. 1847, 10 D. 148; *Towton*, 8 Dec. 1847, 10 D. 225; *Webster*, 27 Nov. 1849, 12 D. 912.

(*g*) *Johnstone*, 15 June 1839, 1 D. 1030.

(*h*) *Supra*, p. 356.

these cases, and refused to make such an appointment (*a*). It would appear that where the minor is abroad, such an appointment is competent, there being Scotch heritage (*b*). A *curator bonis* will be appointed to children whose father is a bankrupt, or otherwise disqualified from being their administrator-in-law (*c*). In one case, the appointment was made on account of the embarrassment of the father's affairs, and his having an opposite interest in certain matters to his children (*d*). The consent of the *minor pubes* must be obtained before the Court can nominate a curator (*e*).

Who may be appointed to the office.

II. Women were formerly eligible to the office (*f*). A married woman was appointed with her husband's consent, he finding caution for her intromissions (*g*); but the Court are averse to such appointments, and in one case refused to appoint a married woman factor *loco tutoris* to her own son (*h*). When, however, the appointment of an unmarried woman has been made, the office does not fall by her subsequent marriage, as in the case of tutors (*i*). After these decisions were pronounced, the Court found so many litigations arising from the mismanagement of female factors and curators, that they have latterly refused to appoint females, married or unmarried (*k*).

In general it may be stated, that any individual of age and

(*a*) *Macarthur*, 16 June 1854, Jur.; and *Barron*, 16 Nov. 1854, 17 D. 61.

(*b*) *Burns*, 13 Dec. 1851, 14 D. 311; *Hay*, 16 July 1861, 23 D. 1291. See *Ross* or *Melbourne*, 11 March 1857, 19 D. 699, with a case to the opposite effect, decided same day; *Lamb*, petr., 19 D. 699. The appointment of judicial factor made in that case was, however, subsequently recalled, and a factor *loco tutoris* appointed. *Lamb*, 20 July 1858, 20 D. 1323.

(*c*) *Johnstone* v. *Wilson*, 11 July 1822, 1 S. 558; *Glassford*, 24 Feb. 1849, 11 D. 1030; *Robertsons*, 12 July 1865, 3 Macph. 1077. But see *Walton*, 17 Jan. 1850, 12 D. 912.

(*d*) *Earl of Buchan*, 21 Dec. 1839, 2 D. 275.

(*e*) *Ross*, 23 Nov. 1832, Jur.; *Wood and Others*, 19 July 1849, 11 D. 1494; *Mayne*, 11 March 1853, 15 D. 554; *Accountant of Court* v. *Buchanan*, 3 March 1854, 16 D. 717.

(*f*) *Riddel* (1746), M. 16350; *Pollock* (1747), M. 16351; *M'Neil*, 1 Feb. 1812, 2 Shand 1000; *Hammond*, 20 Dec. 1831, 10 S. 167.

(*g*) *Anderson*, 31 Jan. 1829, F. C.

(*h*) *Hepburn and Others*, 17 Feb. 1843, 5 D. 655.

(*i*) *Ritchie* or *Lambe* v. *Ritchie*, 14 Dec. 1837, 16 S. 219; and 22 Dec. 1837, in Jur. See *supra*, as to tutors, p. 171.

(*k*) *Horn* or *Duncanson*, 6 March 1845, and *Colonel Fraser*, 6 March 1845, both in Jur. only; *Thorburn*, 2 July 1846, 8 D. 1000; *Cumming*, 4 Feb. 1848, Jur.; *Bethune*, 2 July 1851, 14 D. 11; *Lindsay or Galloway*, 1 Feb. 1855, 17 D. 321.

within Scotland is eligible for the office. A company cannot be appointed factor *loco tutoris* (*a*). Residence beyond the jurisdiction has been held a disqualification (*b*). The party who is suggested by the petitioner is usually appointed, unless he is objected to, or it appear *ex facie* of the petition that he is not a proper person (*c*). It is a recommendation that the party suggested has charge of other property, the interests in which are much the same as in that which is to be administered (*d*). 'This is a matter in which we must exercise our discretion, and it is our duty to look to the question of economy as well as other considerations.' 'The interests are the same; and if we were to make a separate management, it would necessarily lead to much expense' (*e*). This consideration often leads to the appointment of the curator chosen by a minor to be also factor *loco tutoris* to the minor's younger brothers and sisters. Where, however, the person suggested either has or is likely to become possessed of some interest adverse to the ward, he will not be appointed (*f*).

As regards profession, it has been recently laid down as a general rule, that persons appointed to factories under the Court ought to be persons accustomed to business. In that case the Court appointed the person suggested, who was a farmer, only upon proof of his prudence and business habits (*g*). The usual course is to appoint an accountant; but there is nothing to prevent an advocate (*h*), or a writer to the signet, or law-agent (*i*), being named

(*a*) *Per* Lord Gillies in *Macfarlane* v. *Donaldson*, 12 May 1835, 13 S. 725.

(*b*) *Robertson*, 3 Dec. 1846, 9 D. 210. But see *Scott*, 19 Feb. 1851, 13 D. 951. In *M'Donald*, 11 June 1864, 2 Macph. 1194, the Court sustained the nomination of a domiciled Englishman as curator to a minor, but only in special circumstances, and upon his lodging a bond and finding caution 'to fulfil all orders of the Court of Session in the matter of the curatory, and prorogating the jurisdiction of the Court to that effect.'

(*c*) *Thomson*, 8 July 1846, 8 D. 1073; *Forbes*, 4 Feb. 1832, 10 S. 289.

(*d*) *Martin* or *M'Whirter*, 13 Feb. 1852, 14 D. 761; *Scott* or *Clark* v. *Barstow*, 17 June 1856, 18 D. 1041.

(*e*) *Per* Lord President (M'Neill) in *Scott* or *Clark*, *supra*.

(*f*) *Forbes*, 4 Feb. 1832, 10 S. 289; *Arnot*, 25 May 1844, 6 D. 1088; *Raeburn*, 25 Nov. 1851, 14 D. 310.

(*g*) *Anderson*, 22 Nov. 1854, 17 D. 97.

(*h*) *Craigie* (1758), M. 7455; *Cowan* v. *Turnbull's Trs.*, 13 June 1845, 7 D. 872.

(*i*) *Home* (1793), M. 16382; *Hepburn*, 17 Feb. 1843, 5 D. 655; *Morrison* v. *Rennie*, 14 July 1847, 9 D. 1483, H. of L. 22 Dec. 1854, 6 Bell's App. 422; *Flowerdew*, 22 Dec. 1854, 17 D. 263.

factor. In this last case, however, the factor cannot act as law-agent, except on the condition of doing so gratuitously. Where the estate is small, the Court sometimes, to save expense, appoint a party resident in the neighbourhood, rather than a professional gentleman in Edinburgh (*a*); and where the estate consisted of a business, it is probable that a person accustomed to it would be preferred (*b*).

Clergymen.

A minister of the Established Church will not be appointed, as his duties are considered incompatible with the proper discharge of the office (*c*); but a minister of a dissenting congregation is eligible; the Lord President in one case observing, that 'it was only in the case of clergymen of the Established Church that the Court *proprio motu* would decline to appoint the nominee of the parties' (*d*).

Person entitled to the office of tutor-at-law.

The person entitled to serve tutor-at-law ought to adopt the means allowed by the common law to become the guardian of his relative; and one Division of the Court has lately absolutely refused to appoint him to the office of factor *loco tutoris* on any condition (*e*). Both Divisions, however, formerly nominated such persons, and the First Division has not receded from the practice; but as the parties would not be entitled to remuneration *qua* tutors-at-law, the Court would not appoint them factors *loco tutoris*, until they gave in a minute passing from all claim for salary or commission, for discharging the duties of judicial factor (*f*). Their consent to manage the estate without salary may be engrossed in the body of the petition, in which case their name ought to be inserted as petitioners (*g*). This condition is not one which will be imposed *ex post facto* (*h*).

(*a*) *M'Culloch*, 11 Dec. 1851, 14 D. 311.

(*b*) *Dixon* v. *Watson*, 20 Jan. 1832, 10 S. 209.

(*c*) *Thomson*, 13 Nov. 1829, 8 S. 12; *Whitsom*, 31 Jan. 1832, 10 S. 268; *Bisset*, 15 Nov. 1836, 15 S. 4; *Stodart*, 3 Feb. 1830, Law Chronicle, and 4 Deas and Anderson 243; *M'Culloch* or *Milroy*, 22 June 1832, Jur. But see *Campbell*, 13 July 1849, 12 D. 913.

(*d*) *Hall*, 18 Feb. 1830, 8 S. 553. See also *Miller*, 18 Feb. 1830, 8 S. 553; *Fletcher*, 15, and *Henderson*, 21 Nov., and *Smith*, 3 Dec. 1850, 13 D. 951; and *Forbes*, 2 Dec. 1853, 16 D. 109, where such appointments were made.

(*e*) *Arnot*, 25 May 1844, Jur.; *Mortimer*, 18 June 1845, 17 Jur. 457.

(*f*) *Jackson*, 7 Dec. 1821, and 11 Dec. 1821, 1 S. 194 and 203; *Robertson*, 3 Feb. 1830, 8 S. and D. 307, 435, notes. See *Jackson* v. *Wight*, 19 June 1835, 13 S. 961.

(*g*) 3 Jurid. Styles 867.

(*h*) *M'Donald*, 8 July 1854, 16 D. 1023.

It appears from one case, that a father was appointed factor *loco tutoris* to his own child (*a*).

Only one person will be appointed.

In general, no more than one person will be appointed to the office (*b*). Where, however, several persons had been nominated by a father to be trustees to a fatuous son, the Court thought it expedient to nominate them all as curators *bonis* (*c*). The Court will not appoint one person, whom failing another, to be factor *loco tutoris* (*d*). 'We never appoint officers in succession in the manner here prayed for. The petitioners must select one of the two persons for the office' (*e*). In the case of *curators bonis*, however, appointed to minors *puberes* who are unable to choose curators for themselves, a different rule is followed, and the Court appoint two or more, just as the minor himself might have done if in a position to comply with the Act (*f*).

Where there is competition for the office.

Where there is any competition for the office between two parties, who exhibit great keenness to obtain it, either for themselves or their nominees, the Court will disregard them altogether; and the common practice in these circumstances is to remit to the Sheriff or to the clerk of Court to suggest some neutral person (*g*); or the Court may, without any remit, *ex proprio motu*, appoint such party (*h*). In a competition of this kind the Court will prefer the nominee of the nearest agnate (*i*). In one case of very peculiar circumstances the Court preferred the maternal to the paternal grandfather (*k*). In such cases of unsuccessful competition, the expenses of the competition will not be allowed out of the estate (*l*),

(*a*) *Dempster* v. *Potts*, 30 and 31 Dec. 1836, 12 F. C. Jury Sittings, p. 25, end of volume.

(*b*) *Brown and Others*, 1 Feb. 1815, F. C.; *Small*, 21 Dec. 1822, 2 S. 106; *Pettigrew* or *Watson*, 21 Feb. 1839, 1 D. 543; *Sloan*, 18 Dec. 1844, Jur. and 7 D. 227.

(*c*) *Kirk*, 21 May 1836, 14 S. 814. See also *Howden*, 9 March 1833, 11 S. 561.

(*d*) *Dow*, 8 Feb. 1847, 9 D. 616.

(*e*) *Per* Lord President (Boyle), *ibid.*

(*f*) *Young*, 19 Feb. 1818, F. C.; *Ogilvie*, 2, and *M'Neill*, 8 March 1849, 11 D. 1029.

(*g*) *Urquhart* v. *Scott*, 10 March 1824, 2 S. 789; *Menteath*, 30 June 1840, 2 D. 1234; *Cleugh* v. *Taylor*, 16 Feb. 1837, Jur.; *Morton*, 4 March 1837, Jur.; *Stewart* v. *Campbell*, 12 Feb. 1830, 8 S. 512; *Robertson* v. *Robertson*, 11 July 1840, 2 D. 1382; *Grant* v. *Murray*, 2 Dec. 1847, 10 D. 194; *Brown*, 22 Dec. 1848, 11 D. 1027; *M'Intosh*, 9 March 1849, 11 D. 1029.

(*h*) *Cowan* v. *Turnbull's Trs.*, 13 June 1845, 7 D. 872.

(*i*) *Anstruther* v. *Anstruther*, 3 March 1818, F. C.; *Sinclair* v. *Sutherland*, 19 Dec. 1828, 7 S. 214.

(*k*) *Hastie* v. *Thomson*, 9 March 1839, F. C.

(*l*) *Cleugh* v. *Taylor*, *supra*; *Brown*

unless either of the parties withdraw, and suggest the person ultimately appointed, in which case his expenses will be given (*a*); or if the competition has not been characterized by any improper spirit, the same judgment will be pronounced as regards both sides (*b*). Where two petitions for the appointment of a factor were presented of even date, the expense of only one was allowed out of the estate, and selection was made of that which was in proper form, the other requiring some alteration before it could be granted (*c*). In a petition by two of the next of kin for appointment of a *curator bonis* to a lunatic, the rest of the next of kin objected successfully to the party suggested, and were allowed their expenses out of the estate; but the petitioners were only allowed the expense of the petition and printing (*d*).

A bankrupt is ineligible.

An undischarged bankrupt will not be appointed to the office if any one having interest object (*e*); and a person having claims against the pupil, or fatuous, or being indebted to him on any complicated accounting, will not be considered an eligible person for the office (*f*).

Stepfather.

A husband is held to be a bad guardian to his wife's children by a former marriage, and will be rejected as their factor or curator (*g*).

How appointed. By petition to the Court.

III. The appointment of a factor *loco tutoris*, or of a *curator bonis*, is made by one of the pupil's nearest of kin presenting to the Junior Lord Ordinary a summary petition directed to the Lords of Council and Session, setting forth the state of the affairs of the *persona incapax;* the want of some person legally authorized to take the management of the estate; and suggesting some one for the office (*h*).

v. *Brown*, 11 June 1852, 14 D. 856; *Gray* or *Bannerman*, 8 March 1833, 2 Stu. 292.

(*a*) *Morton*, *supra*.

(*b*) *Stewart* v. *Campbell*, *supra*; *Hay* v. *Murray*, 11 March 1837, 15 S. 850; *Raeburn* or *Fraser*, 25 Nov. 1851, 14 D. 310, and 1 Stu. 56; *Smith*, 24 Jan. 1852, Jur.; *Baxter and Mitchell* v. *Wood*, 24 March 1864, 2 Macph. 915.

(*c*) *Hill* v. *Piercy*, 31 Jan. 1854, 16 D. 425.

(*d*) *Cochrane* v. *Macaslan*, 21 Nov. 1849, 12 D. 147.

(*e*) *Dixon* v. *Watson*, 20 Jan. 1832, 10 S. 209. See *Johnston* v. *Wilson*, 11 July 1822, 1 S. 558; *Fraser*, 18 Dec. 1828, 7 S. 205; *Frazer*, 28 Feb. 1849, 11 D. 1028; *Miller*, 17 Nov. 1849, 12 D. 911, and Jur. See also *Towart*, 14 May 1823, 2 S. 305; *Smith*, 15 May 1832, 10 S. 531; *Miller* v. *Jervis*, 20 June 1840, 2 D. 1181.

(*f*) *Thomson* v. *Thomson*, 9 March 1839, Jur.

(*g*) *Buchanan* or *Forbes*, 4 Feb. 1832, 10 S. 289.

(*h*) See 3 Jur. Styles 866; 3 Bell's

By petition to Junior Lord Ordinary.

The petition formerly was presented to one of the Divisions of the Court; but as this occupied the time of four judges in work purely formal, a statute was passed, which provides that 'all summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular, all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court.' The petitions enumerated are: 1. Entail petitions; 2. Petitions under Railway and Lands Clauses Act, etc.; 3. Petitions as to consigned monies; 4. Petitions and applications for the appointment of judicial factors, factors *loco tutoris* or *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration or discharge; and 5. All petitions, applications, and reports under the Pupils' Protection Act (*a*). Full power was given to the Lord Ordinary to decide on and dispose of all such petitions, applications, or reports, after making such investigation and requiring such assistance from professional persons, or persons of science or of skill, as he shall judge proper; and, subject to the right of review by the Inner House on reclaiming note, his judgment was declared equally valid and effectual as a judgment of either Division of the Court to the like effect under previous practice. In cases of difficulty, the Lord Ordinary may report the matter to the Court, and pronounce a judgment in terms of the instruction received from them. The right of reclaiming against the judgment of the Lord Ordinary is limited to interlocutors on the merits pronounced without such report to the Court; and the reclaiming note must be presented within eight days (*b*).

Power to Ordinary to order inquiry.

What petition should state.

Since the passing of the Pupils' Protection Act the Court have uniformly required that petitions for judicial factors, curators, etc., 'must explicitly state the age of the pupil, etc., and the value of

Styles 360; Forms of Summary Proceedings, p. 1.

(*a*) 20 and 21 Vict. c. 56, s. 4.
(*b*) Secs. 5 and 6.

the estate; and in the case of an insane person, the duration of his insanity, and the length of time his funds have been intromitted with by his friends: also, whether the party craved to be appointed has been acting as agent for the pupil or insane person' (*a*). This rule was adopted on the suggestion of the Accountant of Court, who, in looking at old petitions, often found himself quite paralyzed from not being able to discover what the nature of the property was; the usual expression being, 'has left considerable property of various descriptions' (*b*).

At whose instance petition presented.

The petition is generally at the instance of the mother (*c*), but any kinsman may present it, and it is not unusual for several of the next of kin to petition for a factor (*d*). Where a father has conflicting interests with his children, the appointment will be made on his application (*e*). English guardians are also *in titulo* to present such a petition (*f*). In special circumstances, as where there were no relations, petitions have been sustained at the instance of parties nowise related to the pupils. Thus, in one case, a factor *loco tutoris* was appointed to a child on the poor's-roll of a parish, on the application of the committee of management of the heritors and kirk-session of the parish (*g*); and in another case the petitioners were three individuals from whom the pupil, a bastard, received gratuitously board, lodging, and education. It appeared that the boy was ten years of age, his mother was dead, nothing was known of the present residence of the father, he had no known relations; and that although he subsisted on charity he was not altogether destitute, his maternal grandmother having recently died, leaving a settlement by which he was entitled to some property both heritable and moveable, his interests in which there was no party possessed

(*a*) Announced by the Lord President, 5 Dec. 1851, 1 Stu. 112, and applied in *Matthew*, 6 Dec. 1851, 14 D. 312, 1 Stu. 118; *Allan*, 12 Feb. 1852, 14 D. 486; *March*, 12 Feb. 1852, 14 D. 492; *A. B.*, 9 June 1852, 14 D. 849, 1 Stu. 804. It is now the rule of practice.

(*b*) *Per* Lord Justice-Clerk (Hope) in *March*, *supra*.

(*c*) *Cowan* (1788), M. 7452; *Logan*, 2 Feb. 1828, 6 S. 477; *Wight*, 27 June 1837, 15 S. 1197; *Grant* v. *Murray*, 2 Dec. 1847, 10 D. 194; *Raeburn* or *Fraser*, *supra*, p. 464; *Ross* or *Melbourne*, *supra*, p. 463; *Lamb*, *supra*, *ibid.*

(*d*) *Wood*, 19 May 1849, 11 D. 1494; *M'Intyre*, 21 Dec. 1850, 13 D. 951; *Napier*, 27 June 1851, 14 D. 10.

(*e*) *Buchan* v. *Harvey*, 21 Dec. 1839, 2 D. 275; *Mann*, 19 July 1851, 14 D. 12.

(*f*) *Wight*, *supra*; *Alford*, 19 Feb. 1851, 13 D. 950.

(*g*) *Black*, 8 March 1839, 1 D. 676.

of proper authority to protect (*a*). The Court, however, do not readily entertain such applications; and while they may appoint an *interim* factor, they will order special service of the petition on the party at whose instance it ought properly to have been brought. Such was the course followed in regard to a petition by the paternal grandmother of a bastard child whose father was dead and the mother was alleged to be of unsound mind; service of the petition and interlocutor upon the mother being ordered, or cause shown why it should not be done (*b*). It was said in one case to be an uncommon thing for a petitioner to suggest himself as factor (*c*). But the petitioner was appointed in that case, and from the earliest times it has been not unusual (*d*); and there does not seem to be any good ground of objection to the practice, due intimation to the other relatives being always made.

Intimation and service of petition.

The Lord Ordinary orders intimation of this petition to be made for eight days on the walls and in the minute-book, and generally to the nearest of kin on the father and mother's side (*e*). When the application is in the name of the nearest of kin on one side only, the Lord Ordinary (when special service is thought necessary, or is prayed for) appoints intimation to be made to one or more of those on the other side, if there be any (*f*).

Such intimation is essential to the validity of the appointment; and if it has been omitted, the appointment will be recalled. It was so held in regard to an appointment made on the petition of the mother without intimation to the nearest agnates (*g*). 'It is not a mere point of form that is in question, but it is plain that the Court have named a factor *loco tutoris* under circumstances in which it was not entitled to do so. In regard to the naming a proper factor *loco tutoris*, the Court ought first to ascertain if the pupil have no male agnate. And what is the result of this? You

(*a*) *Davison*, 7 March 1855, 17 D. 629.

(*b*) *Buckie*, 11 March 1847, 9 D. 988.

(*c*) *Per* Lord Justice-Clerk (Hope) in *Allan*, 12 Feb. 1852, 14 D. 486.

(*d*) Such appointments were made in a great many of the cases cited *supra*, and also in *Bower* (1750), M. 8910; *Carfrae*, 11 July 1839, 14 F. C. 1059, note; *Graham*, 23 Jan. 1851, 13 D. 951.

(*e*) *Anderson*, petr., 5 Sup. 238; Darling, p. 687; *Cowans*, M. 7452 (1788); and the other cases in this chapter.

(*f*) *Heatley* v. *Logan*, 2 Feb. 1828, 6 S. 477.

(*g*) *Foulds* v. *Hodges*, 10 Dec. 1836, 15 S. 244.

must hold communication with the next of kin on the father's side. The mother *alone* is not entitled to have such a factor appointed' (*a*). 'This is a question essentially as to power. We have no power to proceed in a matter of this sort, except according to the regular and established forms' (*b*). Intimation to the nearest agnate was, however, dispensed with, where it appeared that he was imbecile (*c*).

Where all the next of kin are resident abroad, the Lord Ordinary will appoint a factor without any other intimation than on the walls and in the minute-book (*d*); and in other circumstances, special intimation has been ordered to such residenters abroad (*e*). If the pupil or fatuous be illegitimate, and consequently be without legal next of kin, the Court have dispensed with special intimation, and appointed factors and curators after the usual intimation on the walls and in the minute-book (*f*); but in other cases, again, they have adopted a different course, and ordered intimation to the nearest of kin on the mother's side (*g*).

Although, however, the Lord Ordinary may, *ex proprio motu*, or upon prayer of the petitioner, appoint special service on the next of kin, yet in many cases the interlocutor merely appoints intimation to be made on the walls and in the minute-book. The above observations, therefore, as to service on the next of kin, apply only to those cases where parties wishing to make the proceeding *omni exceptione major* expressly ask for such service along with 'the usual intimation,' or where the Lord Ordinary, in the exercise of his discretionary powers, thinks that there are parties on whom service should be made (*h*).

If, when the case comes into Court, the parties wish a person appointed different from the one suggested in the petition, the appointment will be made, with consent of parties, without a new

(*a*) *Per* Lord Glenlee in *Foulds* v. *Hodges*, 10 Dec. 1836, 15 S. 244.

(*b*) *Per* Lord Justice-Clerk (Boyle), *ibid.*

(*c*) *M'Intyre*, 21 Dec. 1850, 13 D. 951. See *Buckie*, 11 March 1847, 9 D. 698.

(*d*) *Wight*, 27 June 1837, 15 S. 1197; *Carmichael*, 14 June 1848, 10 D. 1286.

(*e*) *Morrison*, 29 Jan. 1845, Jur.

(*f*) *Young*, 19 Feb. 1818, F. C.; *Wood*, 31 May 1834, 12 S. 663.

(*g*) *Supra*, pp. 199 and 356.

(*h*) See *Foulds* v. *Hodges*, *supra*. The practice in 1865 before the Lords Ordinary is to order service to be made, unless the next of kin are all petitioners for the appointment.

intimation, provided the prayer of the petition conclude with the words, 'or to do otherwise in the premises as to your Lordships shall seem proper' (*a*); but after a party is nominated and declines to act, a new nomination could not take place by minute under the original petition: a new application is required (*b*). Where the prayer of the original petition was for the appointment of A., whom failing B., and A. was appointed, and declined to act, B. was appointed under the original petition, but only after new intimation (*c*). The prayer of the petition must not, however, at first be general, *i.e.* to appoint such person to the office as the Court think proper. The name of the party suggested must be given, as this is one of the things to be intimated (*d*).

Interim appointments pending the intimation of the petition.

The Lord Ordinary will not dispense with the usual intimation on account of any urgent necessity for immediate appointment; but he will, in such circumstances, appoint the person suggested *interim* factor until the time of intimation has elapsed (*e*). Formerly, if the application was made so near the end of a session, that the days of intimation would not have run before the Court had risen, the party was appointed factor or curator *ad interim*, he finding caution before extract. Intimation in the usual form was ordered, and the application was made permanent next session (*f*). The reason of this was, that it was then incompetent for the Lord Ordinary on the Bills in vacation, without a special remit, to make a permanent appointment, and doubts were entertained by many of the judges of the competency of their delegating their powers to him. By the Court of Session (Scotland) Act, 1857, however, the powers of the Court in the making of these appointments were transferred, in the first instance, to the Junior Lord Ordinary during time of session; and it was enacted that 'the Lord Ordinary on the Bills during vacation shall have the same powers in regard to petitions for the appointment of factors *loco tutoris*, *curators bonis*,

Powers of Lord Ordinary in Bill Chamber.

(*a*) *Wilson* v. *Bogle*, 26 Jan. 1837; *Hay* v. *Boreland*, 11 March 1837, 15 S. 850. The Court required new intimation in *Scouller*, 28 Nov. 1834, 13 S. 101. But the rule in the text was followed in *M'Millan*, 16 July 1851, 14 D. 12.

(*b*) *Brown* or *Dickson*, 20 Dec. 1831, Jur.

(*c*) *Thomson*, 6 Dec. 1851, 14 D. 312, and 1 Stu. 118.

(*d*) *Buchanan*, 27 Feb. 1833, Jur.

(*e*) *Kirk*, 10 March 1827, 5 S. 564; *A. B.*, 20 Nov. 1829, 8 S. 89; *Goold*, 19 July 1856, 18 D. 1318.

(*f*) *Mason*, 17 Dec. 1851, 14 D. 761, in conformity with the previous established practice.

and judicial factors as are by this Act conferred in relation thereto on the Junior Lord Ordinary as aforesaid' (*a*). Under this Act, the necessity for such *interim* appointments is done away with. There are other cases, however, in which the Court on report by the Lord Ordinary, or the Lord Ordinary, would still make an appointment *ad interim*. They would do so where there was competition for the office, and matters required immediate attention (*b*). This course was followed also in a case where a *curator bonis* under sec. 27 of the Pupils' Protection Act desired his caution to be fixed at a certain amount, and a bond of the British Guarantee Association accepted, instead of a bond by a cautioner, and the case was delayed for inquiry as to the society proposed (*c*). In both cases the Court appointed as factor *ad interim* the sheriff-clerk of the county where the lands lay.

Power of Lord Ordinary on the Bills to appoint.

During vacation, the Lord Ordinary on the Bills under the old law was in use to make an *interim* appointment only, which subsisted until the meeting of the Court, when it was confirmed, and the appointment made permanent (*d*). But under the section of the Court of Session Act above quoted, the Lord Ordinary on the Bills is now vested with the same powers as the Junior Lord Ordinary during session.

Procedure after days of intimation have expired.

On the expiry of the days of intimation, the appointment will be made of course, if there be no opposition, though this was not the former practice. Formerly it was necessary to prove to the Court, that the tutors-testamentar, tutor-at-law, and tutors-dative, had not accepted, or would not do so (*e*). Now, however, a factor will be appointed, even although the party entitled to be tutor-at-law oppose it, on the ground that he is about to serve (*f*); and as the Court cannot compel any one to serve tutor-at-law, they will not limit the appointment to a particular period (*g*). The factor is appointed with the usual powers, without limitation, although part of the pupil's property is situated in England, to the admini-

(*a*) 20 and 21 Vict. c. 56, s. 10.

(*b*) *Brown* v. *Brown*, 22 Dec. 1848, 11 D. 1027.

(*c*) *Wilson*, 30 Nov. 1849, 12 D. 248.

(*d*) *Tayler* v. *Tayler's Trs.*, 18 July 1857, 19 D. 1097, in conformity with previous established practice.

(*e*) *Morrison*, Hailes 359.

(*f*) *Weir* v. *Prentice*, 27 June 1829, *supra*, p. 458.

(*g*) *Bryce* v. *Graham*, 25 Jan. 1828, aff. 23 July 1828, 3 W. S. 323.

stration of which an officer has been appointed by the Court of Chancery (*a*).

Caution to be found by factor.

Before the extract of the factor or curator's appointment is given out, he must find caution to the satisfaction of the clerk of Court for the due discharge of the duties of his office. By sec. 2 of the Pupils' Protection Act it is enacted, 'That every judicial factor shall, within such time after his appointment as the Court shall direct, find caution for his duly accounting for his intromissions and management, and observing and performing every duty incumbent upon him as factor in terms of the rules prescribed or to be prescribed for the discharge of his office, and in case of his failure to do so, his appointment shall fall; and no factor shall enter upon the duties of his office, nor shall an extract of his appointment be issued, until after such caution is found and received as sufficient; and the factor shall extract his appointment without delay' (*b*). By Act of Sederunt, 11 Dec. 1849, sec. 2, it is provided that, 'when not otherwise expressed in the interlocutor appointing a factor or curator on such petition, the time for finding caution shall be one calendar month from the date of such appointment; the Court hereby reserving power, on cause shown, by application made at any time before the expiry of that month, to prorogate the time for finding caution.' The practice under these enactments is, that on failure to lodge the bond within the prescribed time, the appointment falls; but if the failure has been from innocent causes, the Court after new intimation will reappoint the factor on his finding caution (*c*). The ordinary form of caution is by a bond by a cautioner or cautioners; the amount in such bond being unlimited. But by the Pupils' Protection Act it is declared lawful for the Court of Session or Court of Exchequer, as the case may be, to limit upon cause shown the caution to be found by factors and tutors and curators to a specified amount; and also to authorize, if they shall deem it expedient, bonds or policies of the British Guarantee Association, or other public company incorporated by Act of Parliament or royal charter, carrying on business

(*a*) *Earl of Buchan* v. *Harvey*, 21 Dec. 1839, 2 D. 275. See cases cited *supra*, p. 460 (*b*).

(*b*) 12 and 13 Vict. c. 51, s. 2.

(*c*) *Lang*, 25 May 1850, 12 D. 943; *Watson*, 1 Dec. 1852, 2 Stu. 71; *Campbell*, 21 Dec. 1855, 18 D. 292; *Harrowby*, 6 March 1856, 18 D. 733.

within Scotland, to be accepted and taken instead of bonds of caution by private individuals (*a*). In practice this has not been found very workable, such a bond having been accepted, so far as appears from decision, only in one case. In the first application the Court delayed the case to inquire about the British Guarantee Association, and no further step seems to have been taken (*b*). A bond of the British Guarantee Company was accepted after some difficulty by the Court, but only upon a most carefully adjusted bond (*c*). In a late case the Court refused to substitute a bond of caution by the 'National Guarantee and Suretyship Association (Limited)' for one by a private individual. The Court did not 'deem it expedient' to liberate the private cautioner; but the judges went a good deal upon the company being a limited company (*d*). The caution found by the *curator bonis* of a lunatic cannot be received as sufficient until the Accountant of the Court of Session shall approve thereof by a marking to that effect on the bond of caution (*e*). The liabilities of such cautioners are afterwards considered (*f*).

Until the factor finds caution, no one is in safety to deal with him, as the guardian of the pupil or lunatic; and a payment (made to him as such before he had found caution) which he embezzled will not be held as a discharge of the debt, so as to bar a subsequent demand by the pupil (*g*). After caution has been found, the factor extracts an act on the whole proceedings, which is literally a transcript of the application and interlocutors, and forms the warrant to discharge the duties of the office. The factor must extract his appointment without delay. On the death or insolvency of his cautioner, the factor must (*h*) 'forthwith give notice in writing to the accountant of such death or insolvency; and the accountant shall, as soon as the fact shall come to his knowledge, by means of such notice or otherwise, require new caution to be found.'

Duties and powers of

IV. The powers of these officers are the same over the estate

(*a*) 12 and 13 Vict. c. 51, s. 27.

(*b*) *Wilson*, 30 Nov. 1849, 12 D. 248.

(*c*) *Burnett*, 8 July 1859, 21 D. 1197; more fully given in Jurist, where the terms of the bond are set forth.

(*d*) *Sim*, 5 Dec. 1863, 2 Macph. 205.

(*e*) 20 and 21 Vict. c. 71, s. 84.

(*f*) *Infra*, Part vi.

(*g*) *Donaldson* v. *Donaldson's Trs.*, 18 June 1833, 11 S. 740.

(*h*) 12 and 13 Vict. c. 51, s. 11.

as those of tutors and curators, *in loco* of whom they come (*a*). In *Falconer* v. *Thomson* (*b*) it was observed, 'that such an appointment was now made altogether to supply the want of a tutor; and therefore whatever powers were usually and necessarily entrusted to the one, ought also to belong to the other: without this the remedy would be incomplete.' And in a later case this doctrine was confirmed. It was observed by Lord Robertson, that 'it has been stated that whatever powers are usual to tutors should also belong to the factor *loco tutoris*. That may be true relative to the powers of managing the estate, but I doubt if it is so as to the custody of the person' (*c*). The powers and duties of factors *loco tutoris* and *curators bonis* to a large extent were formerly regulated by Act of Sederunt passed by the Court of Session, but they are now regulated by the Pupils' Protection Act (*d*).

factors *loco tutoris* and *curators bonis*.

Where powers of an extraordinary description are necessary, the factor or curator must apply to the Court of Session (*e*); and in many cases, applications of this kind are made for powers which it would seem they possess without special warrant. A tutor, for example, has power at common law to make up the pupil's titles, enter vassals, and make repairs on property (*f*); and it was expressly found that a factor *loco tutoris* could, under his ordinary powers of administration, enter vassals (*g*); and yet there are no cases more common than special applications to the Court, by factors *loco tutoris* and *curators bonis*, for warrant to exercise these powers.

Rental and inventory to be given up by factor.

The first duty of the factor or curator on his appointment is, 'as soon as may be after extracting his appointment, and within six months at latest from the date on which his bond of caution shall have been received, to lodge with the accountant a distinct rental of all lands committed to his management, specifying the rents, revenues, and profits of such lands, the existing leases, and other rights affecting the lands, and the public burdens and other burdens thereon, and a list of all monies and funds belonging and

(*a*) More's Notes, p. ccccxxviii. and p. xliii.

(*b*) 17 Feb. 1792.

(*c*) *Robertson* v. *Elphinstone*, 28 May 1814, 17 F. C. p. 631. See *Paul*, 8 March 1838, 16 S. 822.

(*d*) Act of Sederunt, 13 Jan. 1730; 12 and 13 Vict. c. 51.

(*e*) See this subject considered, *infra*, Part v.

(*f*) *Supra*, p. 234, etc.

(*g*) *Mackay* v. *Houston*, M. 16384 (1796).

debts due to the estate, specifying the particulars of each item, and the interest or revenue arising from the same, the document by which the same is vouched, and the nature and value of any security held for the same; and also an inventory of any household furniture, farm-stocking, goods or moveables, including rights moveable forming part of the estate' (*a*). It is further provided, that this 'rental list and inventory, when adjusted and approved of by the accountant, shall be signed by him and the factor, and shall form a good ground of charge against the factor.' By the same section it is also enacted, that 'if at any time thereafter any new claims or property belonging to the estate shall be discovered, the factor shall report the same in his next account of charge and discharge to the accountant, who shall make such alterations on the rental list and inventory as may be thereby rendered necessary.' In his examination of this rental list and inventory, the accountant is required to 'ascertain the circumstances of the estate, and call for all necessary documents, so as to form a clear rule of charge against the factor at the commencement of his office' (*b*).

Recovery of estate. Rents. Interests.

By sec. 3 it is provided, that the factor 'shall without delay, after extracting his appointment, recover all writs and documents of importance belonging to the estate, and collect all monies due to the same not securely invested, and use all reasonable diligence in ascertaining the exact nature and amount of the estate placed under his hands.' These writs and documents, and the information so obtained by him, the factor is required to produce to the accountant, along with the rental list and inventory above mentioned. This provision of the statute would seem to apply only to principal sums not securely invested; but while there is no express provision in the Pupils' Protection Act requiring the factor to collect current rents and interest, he is at common law bound to do so.

In executing this part of his duty, it is incumbent on him to exercise the same diligence which tutors at law and dative are obliged to employ, and which has been already explained (*c*). By the Act of Sederunt 1730, the factor was rendered liable for interest on sums which 'by diligence he might have recovered,' and

(*a*) Sec. 3 of Act. (*b*) Sec. 12. (*c*) *Supra*, p. 298 *seq.*

therefore he ought to take up the pupil's money from declining debtors (*a*); but in cases where the debts are old, or where it is difficult to ascertain the condition of the debtors at the time, the Court will not hold the factor liable for them, even although he used no legal diligence by poinding, arrestment, or imprisonment, provided the arrears be somewhat in proportion to the annual income of the estate, since in every management, however diligent and careful, there will be often bad debts (*b*). In particular circumstances, the Accountant of Court is empowered (*c*), 'on report to and with approval of the Lord Ordinary, where the sum involved exceeds £20, and without such report and approval where the sum involved is less than £20, to dispense with the rules of exact diligence in any matter of factorial management.'

Investing the ward's funds.

He is bound to stock out his ward's annual income in the same manner as tutors (*d*). He cannot, however, invest the funds in house property (*e*), nor on railway securities (*f*), nor lend it on personal security (*g*), unless in very special cases, where it is absolutely necessary for the preservation of the pupil's means, or in order to obtain a maintenance from the funds (*h*). The proper security is heritable property (*i*); and if this kind of security cannot be obtained, the funds should be allowed to remain in bank. The funds ought to be kept invested in Scotland, and subject to the orders of Court (*k*). By the Pupils' Protection Act, the accountant is required (*l*), when the annual accounts of charge and discharge are lodged by the factor, to 'consider the investments of the estate, and the sufficiency thereof;' and he is 'entitled to require from the factor all necessary information and evidence.' He is further entitled (*m*) to 'make all such requisitions and orders on the factor

(*a*) *Lizars* v. *Dickie*, M. 3532 (1760). Ersk. iii. 3, 37.

(*b*) *Condie* v. *M'Donald*, 20 Nov. 1834; *Ritchie* or *Lambe* v. *Ritchie*, *supra*, p. 231. See *supra*, p. 231 *seq.*

(*c*) Sec. 14.

(*d*) *Supra*, p. 235 *seq.*

(*e*) *Lambe* v. *Chapman*, 24 June 1834, 12 S. 775. See *Forsyth*, 28 Jan. 1853, 15 D. 345; *Thomson* v. *Christie*, 16 June 1852, 1 Macq. 236.

(*f*) *A. B.*, 29 June 1854, 16 D. 1004.

(*g*) *Playfair* v. *Walker*, M. 4072 (1788). See *Blair* v. *Murray*, 4 July 1843, 5 D. 1315; *Elphinstone* v. *Robertson*, 28 May 1814, F. C.

(*h*) *Hamiltons* v. *Hamilton*, 11 July 1834, 12 S. 924; *supra*, p. 224 *seq.*

(*i*) See cases *supra*, p. 236 (*b*).

(*k*) See *supra*, p. 238 *seq.*

(*l*) Sec. 13.

(*m*) Sec. 19.

as he may consider necessary;' and if they are neglected or disputed, the matter is disposed of by the Court (*a*).

Money to be lodged in bank.

Under the Pupils' Protection Act, all factors, tutors, and curators are bound (*b*) to lodge the money in their hands in 'some one of the banks in Scotland established by Act of Parliament or royal charter in a separate account or deposit receipt, such account or deposit being in his own name, as judicial factor on the estate.' The accountant is entitled (*c*) to full information from the officers of any bank where such account is kept or money deposited of all entries relating thereto; and provision is made (*d*) for the annual accumulation of interest on any sums so deposited or in account current.

The factor is liable in interest.

If the factor omit to invest and stock the annual profits of the estate, he is liable in interest upon the funds retained in his hands. The rules of the common law on this subject, relative to tutors, are settled by the leading case of *Montgomerie* v. *Wauchope* (*e*). Factors *loco tutoris* and *curators bonis* are at common law liable in payment of interest on any sums retained by them in their hands.

Penalty for keeping money in his own hands.

By the Pupils' Protection Act it is enacted (*f*), 'That if the factor shall keep in his hands more than £50 of money belonging to the estate for more than ten days, he shall be charged with a sum to the estate at the rate of £20 per annum on the excess of the said sum of £50 for such time as it shall be in his hands beyond the said ten days.' The Court have repeatedly held this enactment to be imperative, and that they have no discretion in its application, even in the hardest cases (*g*).

Where the factor is in advance for his ward, he is entitled to impute the annual income of the estate in extinction, first of the interest, and next of the principal of these advances (*h*). The same doctrine was here settled as in the case of *Montgomery* v. *Wauchope* (*i*), relative to tutors, namely, that the accounts of a

(*a*) See *Forsyth*, 28 Jan. 1853, 15 D. 345; *Accountant of Court* v. *Geddes*, and *Ibid.* v. *Baird*, both 29 June 1858, 20 D. 1174 and 1176.

(*b*) Sec. 5.

(*c*) Sec. 32.

(*d*) Sec. 37.

(*e*) *Supra*, p. 236.

(*f*) Sec. 5.

(*g*) *Accountant of Court*, 13 Feb. 1852, 1 Stu. 441; *Ballingal*, 2 June 1853, 15 D. 711; *M'Donald* v. *M'Donald*, 8 July 1854, 16 D. 1123; *Maxwell's Trs.* v. *Jeffs*, 27 June 1862, 24 D. 1181.

(*h*) *Condie* v. *M'Donald*, 20 Nov. 1834, 13 S. 61.

(*i*) *Supra*, p. 236.

continuous intromitter must be closed yearly; the interest, or the balance of interest, as the case may be, being put to his debit if against him, and to his credit if in his favour, and the balance thus brought out being carried to the succeeding year's account.

Making up of annual accounts.

On the factor's bond of caution being received as sufficient, it is provided (*a*) that the accountant 'shall forthwith give a written intimation, dated and signed, to the factor or his agent, stating that the bond has been received, and assigning the day on which the factor is to close his first account, being not less than six nor more than eighteen months from the date of such intimation.' The factor, on the other hand, it is declared (*b*), 'shall close his account of charge and discharge once in every year on a day to be fixed by the accountant, and within one month thereafter shall lodge such account in the office of the accountant, with the vouchers numbered and referred to in the account by number.' On cause shown, the accountant may prorogate the time for lodging the account, but in no case beyond three months from the day fixed for its being closed. It is enacted (*c*), 'That the accountant shall see that the factor's accounts of charge and discharge, with the vouchers thereof, are duly lodged, and shall thereafter examine the same without undue delay, and audit the account on the general principles of good ordinary management for the real benefit of the estate, and of those interested therein.' The accountant is empowered to 'fix the amount of the factor's commission for the period embraced by the audit, according to his opinion of what is just in each particular case.' It is further provided, 'that the accountant (*d*) shall strike the balance, and shall state the result of his audit in the form of a short report; and if he has made any corrections on the account, he shall, if required by the factor, explain such corrections, and his reasons for making them.' It is competent for the factor to state objections to the accountant's report. The regulations as to the disposal of such objections have been already detailed in treating of tutors-at-law and tutors-dative (*e*).

Penalties imposed by statute on factor neglect-

In order to ensure compliance with the provisions of the statute, various penalties have been provided. The first of these is penal

(*a*) Sec. 11.
(*b*) Sec. 4.
(*c*) Sec. 13.
(*d*) Same section.
(*e*) See *supra*, pp. 329, 330.

ing its enactments; not lodging sums in bank.

interest (*a*) at the rate of twenty per cent. on all sums above £50 kept in the factor's hands for more than ten days; it being further enacted, that 'unless the money has been so kept from innocent causes, the factor shall be dismissed from his office, and have no claim for commission.' This penalty has been imposed in various cases; the factors have been dismissed, and the commission refused (*b*). Where the money has been kept in hands from innocent causes, the Court allowed the commission (*c*). But it has been held that a factor who, through failure to lodge regular annual accounts, did not know that he was indebted to the estate in a sum exceeding £50, and who, on an accounting, was found to be indebted upwards of that sum, is liable under the Act, as his retaining the money was not from innocent causes (*d*). In one case, where a defaulting factor cited to appear in Court obtained from his ward, now a major, a discharge, reserving his right to commission, the Court disregarded the discharge, examined into his accounts, and finding a balance in his hands exceeding £50, imposed the penal interest, and disallowed his claim for commission; observing, however, that the lady might, if she pleased, repay him the penal interest imposed, and pay him a commission *ex gratia* (*e*).

Factor misconducting himself is fined and removed.

By sec. 6 it is enacted, 'That if the factor shall misconduct himself, or fail in the discharge of his duty, he shall be liable to such fine, and to the forfeiture of the whole or any part of his commission, and to suspension or removal from his office as factor, and to payment of expenses, or to any one or more of such penalties, as the Court in its discretion shall decide, and that over and above such further liability as he may be subject to as accords of law, in reparation of any loss or damage sustained by the estate in consequence of such misconduct or failure.'

Not lodging annual accounts.

The regulation most frequently neglected is the lodging of annual accounts of charge and discharge. Under the Act of Sederunt 1730, the factor failing in this particular became 'liable to such a mulct as the Lords of Session shall modify, not being

(*a*) Under sec. 5.

(*b*) *Accountant of Court*, 13 Feb. 1852, 1 Stu. 441; *M'Donald* v. *M'Donald*, 8 July 1854, 16 D. 1123; *Maxwell's Trs.* v. *Jeffs*, 27 June 1862, 24 D. 1181.

(*c*) *Ballingal*, 2 June 1853, 15 D. 711.

(*d*) *M'Donald* v. *M'Donald*, *supra*.

(*e*) *Accountant of Court*, 13 Feb. 1852, 1 Stu. 441.

under an half-year's salary.' In applying this the Court had a discretionary power of increasing the mulct, but they could in no case make it less than one-half of the commission of every year when the accounts were not lodged; the factor being entitled to the full salary for those years when he lodged the accounts (*a*). In general all salary was refused (*b*); but in favourable cases, where no loss had accrued to the estate, and where the management of the factor otherwise had been judicious, the Court allowed the highest salary they were empowered to grant, namely, one-half of the usual commission (*c*). Where the accounting took place, not with the delinquent factor himself, but with his heirs, it was doubtful whether the penalty laid down in the Act of Sederunt could be imposed on them; that is, whether they were barred from claiming the usual commission that would, in the circumstances, be denied to the factor himself. The Act termed it a 'mulct' or penalty; and the general rule of law is, that no penal action transmits against heirs (*d*). *Obiter dicta* fell from the Bench in the case of *Condie*, to the effect that the heirs could demand the full commission. The point was argued at great length in *Kerr* v. *Bremner*, but a decision on the point was waived; commission having been denied, upon the special ground that the factor had not accounted for the funds, and that the amount to be recovered from his estate would fall short of the just amount of these funds by a larger sum than the commission claimed. Lord Jeffrey, in a long note, expressed great doubts as to the soundness of the opinions expressed in *Condie* v. *M'Donald*, and was inclined to hold that this was not a penalty to which the above rule was applicable; and on general principle, he held that the heir could not claim salary or commission any more than his father (*e*).

Under the Pupils' Protection Act, this matter is left in the discretion of the Court. In special circumstances the Court have merely reprimanded the factor (*f*). In other cases a fine has been

(*a*) *Condie* v. *M'Donald*, 20 Nov. 1834, 13 S. 61; *Ritchie* or *Lambe* v. *Ritchie*, *supra*, p. 207.

(*b*) *Cranston and Hay* v. *Scott*, 1 Dec. 1826, 5 S. 62.

(*c*) *Condie*, *ut supra*; *Ritchie* or *Lambe*, *ut supra*; *M'Donald* v. *M'Donald*, 8 July 1854, 16 D. 1123.

(*d*) Ersk. iv. 1, 14.

(*e*) *Kerr* v. *Bremner*, 19 Dec. 1835, not reported. See Appeal Case of date 14 July 1837.

(*f*) *Acct. of Court* v. *Hutton and Others*, 15 Jan. 1852, 14 D. 330; *Acct. of Court* v. *A. B.*, 5 June 1852, 14 D. 843, 1 Stu. 794.

imposed, with expenses (*a*); and in more aggravated cases the factor has been removed from office, and even an arbitrary punishment inflicted (*b*).

Miscellaneous powers of factor without special authority.

A factor *loco tutoris* and *curator bonis* may, in virtue of 'the usual powers' of these offices, enter into submissions relative to claims of a moveable nature, provided the subject be fit for a reference, and the referee be suitable (*c*). They may let heritage and remove tenants (*d*), serve their ward apparent heir *cum beneficio inventarii* (*e*), enter vassals (*f*), grant ordinary leases (*g*), make ordinary improvements upon the estate (*h*), but not those of an extraordinary or unusual nature (*i*). They may institute actions for reducing deeds adverse to their ward's interest, for securing any rights belonging to him (*k*); and they may enter appearance and defend any action brought against him (*l*). They may compromise claims against the estate (*m*). Where an action is brought against a factor and pupil, it will be sufficient to cite the pupil and the factor personally, without also citing curators (*n*). The Court have refused to give special power to a factor to raise an action of reduction, leaving him to act according to his own discretion and on his own responsibility (*o*). He may collate heritage of his ward with an executor (*p*). He must pay debts owing by the ward; and

(*a*) *Acct. of Court* v. *A. B.*, *supra*.

(*b*) *Acct. of Court* v. *Jaffrey*, 20 Dec. 1851, 14 D. 292, 1 Stu. 139; *Forsyth*, 1 June 1853, 15 D. 708; *Acct. of Court* v. *Hutton*, 15 Jan. 1852, 14 D. 330; *Id.* v. *M'Allister*, 22 Dec. 1853, 16 D. 301; *Id.* v. *Wilkie*, 8 March 1856, 18 D. 793.

(*c*) *Falconer* v. *Thomson*, M. 16380 (1792); *Corson*, 10 July 1835, 13 S. 1093. See *Brown* v. *Scoular*, M. 16359 (1758).

(*d*) *Thomson* v. *Elderson*, M. 4070 (1757); *Carlyle* v. *Lowther*, M. 8380, 5 Sup. 571 (1766); *Home*, petr., M. 16382 (1793).

(*e*) *Paton*, petr., M. 4071 (1785). But see *Riddell*, supplicant, M. 16350 (1746).

(*f*) *M'Kay* v. *Houston*, M. 16384, 8726 (1796).

(*g*) Assumed in sec. 7 of 12 and 13 Vict. c. 51.

(*h*) *Home*, petr., M. 16382 (1793).

(*i*) *Graham* v. *Hopeton*, M. 5599 (1798).

(*k*) *Blaikie* v. *Milne*, 14 Nov. 1838, 1 D. 18; *Strathallan* v. *Glenlyon's Trs.*, 21 May 1840, 2 D. 840; *Forbes* v. *Morrison*, 19 June 1845, 7 D. 853; *Fraser*, 10 June 1850, 12 D. 914.

(*l*) *M'Intosh's Trs.* v. *M'Queen's Trs.*, 13 Dec. 1836, 15 S. 255; *Earl of Eglinton* v. *Montgomerie*, 22 Jan. 1842, 4 D. 425.

(*m*) *Anderson*, 7 March 1855, 17 D. 396; *M'Donald*, 22 Feb. 1856, 18 D. 630.

(*n*) *Colville* v. *Malcolm*, 8 June 1843.

(*o*) *Howie*, 6 Dec. 1826, 5 S. 77; cases *supra*, as in (*k*).

(*p*) *Per* Lord President in *Robertson*, petr., 14 Jan. 1841.

accordingly a factor *loco tutoris* may, without special powers, grant a feu right in implement of an obligation to that effect undertaken by the pupil's ancestor (*a*). It is within the ordinary powers of a factor *loco tutoris* to thin plantations of growing timber, and to sell off wine which is deteriorating (*b*).

Factor to pay aliment to ward's relations.

The factor ought to give a suitable aliment and maintenance to his ward, and pay a sum on this head to those relations whom the latter is bound to support, such as his father or mother. As this is a matter of discretionary power, the general practice is to make a special application to the Court to fix a suitable sum (*c*); and in case the bad health of the pupil, or other peculiar circumstances, should render it necessary to obtain an increase of the sum awarded, a new application should be made to the Court (*d*). If the sum allowed by the factor be considered suitable, it will be sustained as a proper act of administration, although he asked for no special powers (*e*). A judicial factor, in like manner as tutors, cannot alter the ward's succession (*f*).

Altering succession.

Special applications to the Court for powers.

In nearly all the matters now stated, the modern practice is, to ask special power from the Lord Ordinary. This is more particularly the case with regard to entering vassals, making up the ward's titles, collating heritage, making improvements on the estate, and letting lands (*g*). In some cases the Court have refused applications as unnecessary; but in the majority of cases special warrant to do the thing has been granted (*h*). In one case, where the factor had made considerable repairs on a ship which was almost the only property of his ward, the Court, while they allowed credit for these repairs, intimated an opinion that he ought to have applied for special powers (*i*). With regard to matters which the factor cannot do under his usual powers, a reference may be made to the chapter *infra*, as to cases where special authority has been granted (*k*). If

(*a*) *Thomson*, petr., 10 March 1837, 9 Jur. 371.

(*b*) *Maconochie*, 15 July 1853, 2 Stu. 567.

(*c*) *Jackson* v. *Gourlay*, 24 Dec. 1836, 15 S. 313; *Earl of Buchan*, 16 Dec. 1837, 16 S. 238; *Grant* v. *Cameron*, 24 Feb. 1838, 16 S. 652; *Hamilton*, 9 Feb. 1842, 4 D. 627.

(*d*) *Grant* v. *Cameron*, 3 March 1840, 2 D. 722.

(*e*) *Ritchie* or *Lambe* v. *Ritchie*, *supra*, p. 231; also *Hamilton* v. *Hamilton*, 11 July 1834, 12 S. 924.

(*f*) *Hannay* v. *Kennedy*, 17 Nov. 1843.

(*g*) *Infra*, Part v.

(*h*) *Infra*, *ibid.*

(*i*) *Macleod*, 5 Dec. 1856, 19 D. 133.

(*k*) Part v.

the decisions there referred to, which were generally pronounced *ex parte*, do not settle what a factor cannot do without special power, they at least show the understanding of the profession as to the cases in which it is advisable to have the authority of the Lord Ordinary before the proposed act is carried through.

Ward's person.

Neither a factor *loco tutoris* nor a *curator bonis* is entitled to the custody of the person of the pupil or minor, or party insane; nor can he fix his residence (*a*); but he is entitled to apply to the Court for the ward's protection when the party in whose custody he is is guilty of misconduct, or does anything hurtful to him (*b*).

Direct superintendence held by the Court over these officers.

A factor *loco tutoris* or *curator bonis* stands in a different position from ordinary tutors. The former are officers of Court, and may be called upon at any time to justify their conduct; whereas a tutor, unless he does something rendering him suspect, cannot be interfered with (*c*).

The peculiar relation of a judicial factor to the Court, and the direct power held by the latter over him, is illustrated by various cases. Thus, in an action of count and reckoning against an executor, a factor *loco tutoris* having been appointed to the pursuer (a pupil) to grant a discharge, and the fund being afterwards made the subject of a multiplepoinding, the factor having failed to appear, the Court ordered special intimation to him, requiring him to show cause why he should not appear (*d*). Again, allegations having been made at the bar, of abuse of office by a factor *loco tutoris*, the Court, without any motion by a party to that effect, ordered him to give an explanation of the suspicious circumstances (*e*). They will also make an order upon the factor to pay sums in name of aliment to the pupil or his relations, without a regular action, and simply on petition (*f*).

Control over factors by the Court as under Pupils' Protection Act.

Important changes were introduced in regard to this matter by the Pupils' Protection Act. While the Court still possesses an inherent jurisdiction at common law in such matters, and still exercises, where occasion calls for it, such power, the regulations of

(*a*) *M'Leod* v. *Hill*, 26 Feb. 1833, Jur.; *Robertson* v. *Elphinstone*, 28 May 1814, F. C. p. 631; *Bryce* v. *Grahame*, 25 Jan. 1828, aff. 23 July 1828, 3 W. S. 323.

(*b*) *Supra*, p. 221.

(*c*) *Supra*, p. 228.

(*d*) *Thomson* v. *Thomson*, 14 July 1841.

(*e*) *Kennedy* v. *Steele*, 16 Nov. 1841.

(*f*) *Grant* v. *Cameron*, *supra*.

this Act are those under which defaulting factors are now more usually punished. The accountant appointed under the Act is required to superintend generally the conduct of all factors and tutors and curators coming under the provisions of the Act, and to see that the various duties of the factors already detailed are properly performed (*a*). He is empowered (*b*) to 'make all such requisitions or orders on the factor as he may consider necessary; and if such requisition or order shall be disobeyed or neglected, he shall report the same to the Lord Ordinary, giving previous notice to the factor or his agent, who shall lodge objections in writing, if he any has, within forty-eight hours after such notice.' The Lord Ordinary may 'recall or vary, confirm or repeat, such requisition or order;' the interlocutor of the Lord Ordinary being final and conclusive against the accountant, but subject to review at the instance of the factor (*c*). The accountant is required (*d*) at all times when requisite to 'report to the Lord Ordinary, or the Court, any disobedience of any requisition or order, and any misconduct or failure in duty on the part of a factor, or any claims arising against a dismissed factor, or a factor's cautioner, or against the representatives of a factor or cautioner deceased;' the matter so reported to be dealt with 'immediately as accords of law.' It is the practice of the Court in such cases to appoint the factor to appear personally at the bar to answer to the complaint made against him; and if he fail to do so, warrant for his apprehension is granted (*e*). In some cases the Court have awarded a sentence of imprisonment, holding the factor's disobedience to the orders of the accountant and the Acts of Sederunt to be a direct contempt of Court (*f*). In others they have exercised, in virtue of their *nobile officium*, the power expressly conferred upon the accountant (*g*) of laying a case before her Majesty's advocate, with a view to inquiry, and such ulterior proceedings as might be considered proper (*h*).

Duties of Accountant of Court.

Disobedience by factor of accountant's orders.

(*a*) Secs. 10, 11, 12, 13.

(*b*) Sec. 19.

(*c*) Sec. 19.

(*d*) Sec. 20.

(*e*) *Accountant of Court* v. *Jaffrey*, 20 D. 1851, 14 D. 292, 1 Stu. 139; *Id.* v. *Hutton*, 15 Jan. 1852, 14 D. 330; *Id.* v. *Macalister*, 11 March 1852, 1 Stu. 641; *Id.* v. *M'Allister*, 22 Dec. 1853, 16 D. 301; *Id.* v. *Wilkie*, 8 Mar. 1856, 18 D. 793. See also *Dewar*, 16 D. 163 and 489, a tutor-at-law.

(*f*) *Accountant of Court* v. *M'Allister*, 16 D. 301; *Id.* v. *Dewar*, 16 D. 489, observations of the Lord Justice-Clerk.

(*g*) Sec. 21.

(*h*) *Accountant of Court* v. *Jaffrey*, 20 Dec. 1851, 14 D. 292. For the

How the office terminates.

V. In general, it may be laid down that the office terminates in the same manner as that of tutory (*a*). There are, however, exceptions to this rule. A female's marriage does not void her office of judicial factor (*b*), though it does that of tutory (*c*). The office of factor *loco tutoris* to a pupil, or *curator bonis* to one insane, comes to an end by the tutor-at-law serving to that office (*d*), or by the Court of Exchequer appointing a tutor-dative (*e*). The arrival of a pupil at puberty, or a *minor pubes* at majority, or a lunatic becoming sane, voids the office; but the Court, before granting the factor or curator his discharge, require evidence of the person's age in the one case, and of his sanity in the other (*f*). The death of the ward or factor terminates the office. A remit is made to an accountant; and on his reporting that the accounts are correct, the factor will be discharged (*g*).

Resignation by the factor or curator.

A tutor, after accepting office, cannot resign it without the permission of the Court (*h*). It would appear that the same rule holds as to a factor *loco tutoris;* and the Court will not recall the appointment and discharge the factor until another be appointed, even though the accounts be audited and be found correct (*i*). The point was raised in a late case, where a factor *loco tutoris* whose cautioner had died applied to the Court to be relieved of his office as he was unable to find new caution, the former cautioner having experienced considerable annoyance from litigation with the pupil's mother. Considerable doubts were expressed on the general point as to whether the factor, without cause shown, could withdraw; but all the judges were agreed that if that were necessary, sufficient cause had been shown, and the prayer of the petition was granted. The Lord President (M'Neill) observed: 'I have again considered the point whether a factor must show some reason for withdrawing from his office. I give no opinion upon that general question. But I am of opinion that

final disposal of case, see 18 Nov. 1854, 17 D. 71.

(*a*) *Supra*, p. 308.

(*b*) *Ritchie* or *Lambe* v. *Ritchie*, 14 Dec. 1837, overruling *Anderson*, 31 Jan. 1829, F. C.

(*c*) *Supra*, pp. 171 and 309.

(*d*) *Bell* v. *Henderson*, M. 16374 (1734); *Rose* v. *Young*, 11 July 1839; *Bryce* v. *Graham*, *supra*, p. 482.

(*e*) *Gordon*, 25 May 1839, Jur.

(*f*) *Walker*, 18 Jan. 1843.

(*g*) See *infra*, p. 486, for procedure in discharge.

(*h*) *Supra*, p. 310.

(*i*) *Corson*, 4 July 1837, Jur.

sufficient reason has been shown for this party not continuing in office' (*a*).

Removal of factor by the Court.

The factor will be removed by the Court if he fails to discharge his duty properly (*b*). Factors under the Pupils' Protection Act are liable to dismissal from office for any breach of the regulations introduced by that Act for their proper conduct (*c*). But the grounds of removal are not confined to such breaches of duty. If the factor leave the country (*d*), or become bankrupt (*e*), he will be removed; and in this latter case, an offer of ample caution will not be regarded (*f*). It is no ground for removing a factor that he lent his ward's funds to himself, although this is regarded as an act of mal-administration, which will be ordered to be at once remedied by a proper investment of the funds (*g*).

Form of procedure in petitions and complaints against factors.

The mode in which a factor may be removed, is by a petition and complaint (*h*). The Junior Lord Ordinary, before whom it now comes, orders it to be served, and answers to be put in in writing within eight days after service. The cause will be enrolled before the Lord Ordinary, after the expiry of the time allowed for answers, or after answers have been given in; and he will proceed to prepare the case, as nearly as possible in conformity with the form in other processes. If no answers be given in, or in case of either party failing to comply with any other order to be made by the Lord Ordinary, his Lordship will give judgment in absence. If the cause shall appear to turn merely upon a point of law, the Lord Ordinary orders notes of pleas; and thereafter, and on hearing parties, takes them, with the petition and complaint and answers, to avizandum. Condescendence and answers may be ordered, and remits made, to try any fact by a jury (*i*). There has been no instance of this under the Pupils' Protection Act, the matter being

(*a*) *M'Ewan* v. *Drummond*, 27 June 1857, 19 D. 936.

(*b*) See *supra*, as to tutors, p. 311.

(*c*) 12 and 13 Vict. c. 51, ss. 5, 6. See, for cases in which factors have been dismissed, *supra*, p. 482 *seq.*

(*d*) *Bell*, 7 March 1834, 12 S. 531; *Green*, 16 Feb. 1839, 11 Jur. 342; *Gould*, 17 Jan. 1849, 11 D. 1028; *Kyle*, 10 June 1862, 24 D. 1083.

(*e*) *Scouller* v. *Thomson*, 22 Dec. 1837, Jur.; *Fraser*, 18 Dec. 1828, 7 S. 205; *Forsyth*, 1 June 1853, 15 D. 708.

(*f*) *M'Pherson* v. *A. B.*, 19 Dec. 1840, 3 D. 315.

(*g*) *Elphinstone* v. *Robertson*, 28 May 1814, F. C.

(*h*) See the form in Appendix; 3 Bell's Styles 377.

(*i*) Act of Sederunt, 11 July 1828, sec. 89, and prior sections.

usually disposed of on petition and answers, and after remit to the accountant; but under the general powers of the Court, if disputed facts required to be ascertained, this would be done either by proof on commission or by jury trial. Where the complaint was by a lunatic under curatory, the Court did not appoint a curator *ad litem*, but stated that the proper course was to present a petition for an interim *curator bonis ad hunc effectum* (*a*).

Discharge of factor by the Court.

When the office terminates in any of the modes now stated, the factor or his representatives must obtain a discharge from the Court. By the Pupils' Protection Act it is enacted (*b*), 'That it shall be competent for any factor, tutor, or curator at the termination of his office, to present a petition to the Court for his discharge, calling all parties interested in the estate, so far as known to him, as parties to such petition, and the Court (now Lord Ordinary) shall order such intimation and service as they may think fit; and it shall be competent to any persons so called, or to any other persons showing right and interest, to appear as parties, and upon cause shown to open up the audit of the factor's accounts; and thereafter, and after receiving the report of the accountant, and making any further inquiry which may be necessary, the Court shall pronounce judgment thereon.' In the petition, the circumstances are stated generally; a remit is craved to the accountant to make his report; and on a report from him of the correctness of these, the discharge of the factor is prayed for (*c*). Where the factor is content with an extrajudicial discharge from the parties interested, he produces that with his petition, and craves only an order upon the accountant to deliver up his bond of caution. The petition is ordered to be intimated on the walls and in the minute-book, and by personal service on a proper contradictor. If the service is not made on the proper party, the factor will not receive his discharge (*d*). A relative of the party under ward may compear and object to the accounts (*e*).

After the lapse of the days of intimation, the consideration of the matter is resumed. The Lord Ordinary thereupon remits to

(*a*) *Mackenzie*, 21 Jan. 1845, 7 D. 283.

(*b*) Sec. 34.

(*c*) See the form in Appendix; 3 Bell's Styles 380; Forms of Sum. Proceedings, p. 29.

(*d*) *M'Gavin*, 21 June 1821.

(*e*) *Robertson* v. *M'Dougall*, 17 July 1841, Jur.

the accountant, and avizandum is made with his report, and the discharge is granted if the report be favourable. The decree is thereafter extracted, the bond of caution delivered up, and the whole proceedings close. All obligations undertaken by the factor within the line of his duty are debts against his former ward after the office is terminated (*a*). Before obtaining his discharge, the factor must account for all the funds belonging to the estate recovered by him, wherever they are situated, and even though furth of the jurisdiction (*b*). If there be a balance in his hands, this must be consigned before he can obtain the discharge. This holds even where he is entitled in another character to intromit with the estate. Thus, the Court refused a discharge to a factor *loco tutoris* who had been chosen curator by his former wards, until he consigned the balance in his own name as curator (*c*). And the same rule was applied to the *curator bonis* of a lunatic, who upon the death of the ward was decerned her executor *qua* next of kin, his discharge as curator being refused until a receipt by himself as executor was lodged in process (*d*).

In certain cases, the discharge used to be granted *de plano* after intimation only, without a remit to the accountant. This was done where the party who had been under ward, having arrived at full age, or become sane, and in capacity to manage his affairs, had settled with the factor and discharged him (*e*); and the same procedure was followed when the discharge was granted by the representatives after the ward's death (*f*). This course has not been followed of late years, the Court preferring the 'excellent rule' commended by Lord Medwyn: 'There was an excellent rule, that when a party was satisfied with an extrajudicial discharge, it might be given; but if he wished a discharge by the Court, he must go through the regular forms' (*g*). The Lord Ordinary invariably refuses a judicial discharge without a remit to the accountant; and

(*a*) *Orr* v. *Ross*, 16 May 1822, 1 S. 412.

(*b*) *Simpson* v. *Doud*, 1 Feb. 1855, 17 D. 314.

(*c*) *Duncan*, 20 Dec. 1851, 14 D. 313.

(*d*) *Robert Nugent Dunbar*, 16 July 1857, not reported.

(*e*) *Grant* v. *Cameron*, 24 June 1835, 13 S. 966; *Martin*, 14 June 1851, 13 D. 1160.

(*f*) *M'Laren*, 29 June 1833, Jur.; and *Donaldson*, 11 June 1833, Jur.

(*g*) *Per* Lord Medwyn in *Martin*, *supra*.

the order pronounced by the Court where an extrajudicial discharge is produced with which the party is content, is limited to an order on the accountant to deliver up the bond of caution (*a*). But if the party be still a minor or insane, and the office come to an end by the factor's death, or in any other way, the Court will remit to an accountant, although the new factor appointed has reported favourably on the accounts (*b*).

In cases of difficulty and complexity, the factor may apply at short intervals to the Court to have his accounts audited, and a balance then struck,—a course which saves the necessity of having an arrear of old accounts to be examined at the termination of the factory, when the circumstances relating to them are in a great measure forgotten (*c*). Although it is provided by the statute that the factor's accounts shall be lodged every year, the meaning of this is not that the parties must see and object to them annually, and that no objections can be stated to the accounts lodged, if not stated at the time. The Act means, that the accounts should be seen from time to time, so as to afford information for checking them in the final accounting; and as there is generally no proper accounting till the end of the factory, there being no proper party in the field to object, although it is competent to relations to do so (*d*), the statute contains special provision for the opening up of the audit of the factor's accounts in favour of parties interested (*e*). Until the factor is discharged, he is entitled to sue as 'factor *loco tutoris*,' although the whole proceedings in connection with the affairs of the office have been wound up (*f*).

Commission to factor.

The factor or curator is entitled to a commission for his services. This is generally five per cent., though the amount will vary according to the extent and onerosity of the business he has had to manage. It is fixed by the accountant every year, in terms of the Pupils' Protection Act, which provides (*g*) that 'he shall fix the

(*a*) *Yeats*, 16 Feb. 1849, 11 D. 1031; *Davie*, 20 July 1849, 11 D. 1495; *Rollo*, 8 July 1852, 14 D. 990, 1 Stu. 979; *Mackay*, 21 Feb. 1857, 19 D. 503; *White*, 20 July 1860, 22 D. 1473; *Rintoul*, 21 Jan. 1861, 23 D. 357. The competency of this was doubted in *Steele*, 14 Dec. 1852, 15 D. 229, 2 Stu. 107, but it is now matter of every-day practice.

(*b*) *Tweedie*, 21 Nov. 1844, Jur.

(*c*) Darling 693.

(*d*) *Condie* v. *Stewart*, 10 Dec. 1834, Jur. vol. vii. p. 95.

(*e*) See secs. 15 and 17.

(*f*) *Paul* v. *M'Intosh*, 2 July 1841, 13 Jur. 517.

(*g*) Sec. 13.

amount of the factor's commission for the period embraced by the audit, according to his opinion of what is just in each particular case.' The remuneration of the factor is limited to the commission, on the principle that 'a trustee cannot make a profit as a trustee' (*a*). In a very special case, the Court have allowed the factor —a slater—to make charges for his work, which was beneficially expended, and with the approval of all parties (*b*); but it is not a precedent which the Court would readily follow.

(*a*) See observations of Lord Chancellor in *Rennie*, 27 June 1849, 11 D. 1201, 6 Bell's App. 422. See also *Flowerdew*, 22 Dec. 1854, 17 D. 263; cases of *Douglas* and *Mackenzie*, 12 Nov. 1856, 19 D. 1; *Kennedy* v. *Rutherglen*, 25 Jan. 1860, 22 D. 567.

(*b*) *Nicol*, 4 July 1851, 14 D. 11.

PART FIFTH.

EXTRAORDINARY POWERS GRANTED BY THE LEGISLATURE AND THE COURT OF SESSION TO GUARDIANS.

THE limited powers possessed by guardians do not enable them in all cases to manage the property under their charge in such a manner as would prove beneficial to their ward; and hence the Legislature and the Court of Session are in many instances called upon to grant them additional powers.

SECTION I.

EXTRAORDINARY POWERS GRANTED BY THE LEGISLATURE.

The cases where the Legislature interferes are generally those where, in order to carry into effect some public or national object, it is necessary to grant authority to the guardians of persons incapable of acting, to do those things which the *personæ incapaces* could, if *sui juris*, have done for themselves. Many of the Acts of Parliament since the Union contain clauses of this nature. The provisions of these statutes have all been, however, superseded by the general statute, 8 and 9 Vict. c. 19, which greatly enlarges the powers of guardians, and which may be taken as an example of the provisions to the same effect contained in most Railway and Canal Acts, and other Acts where the possession of land is necessary to carry the object of the statute into effect.

Powers granted by Lands Clauses Act.

The 8 and 9 Vict. c. 19 is entitled, 'An Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the taking of lands for undertakings of a public nature in Scotland.' The Act is declared to apply 'to every undertaking in Scotland authorized by any Act of Parliament which shall hereafter be passed, and which shall authorize the taking of lands for such undertaking; and this Act shall be incorporated with such Act.' It is enacted by sec. 7 of this statute, 'That it shall be lawful for all parties being possessed of any lands, or any such right or interest therein, to contract for, sell, convey, and dispose of such lands, or of such right therein, to the promoters of the undertaking, and to enter into all necessary agreements for these purposes; and particularly it shall be lawful for the parties following so to do: all corporations, heirs of entail, liferenters, or persons holding any other partial or qualified estate or interest, married women seised in their own right, or entitled to terce or dower, or any other right or interest; husbands, tutors, curators, and other guardians for infants, minors, lunatics, or idiots, fatuous or furious persons, or for persons under any other disability or incapacity; judicial factors, trustees, or feoffees in trust for charitable or other purposes; executors and administrators.' Married women are allowed to sell and contract as if they were sole, and guardians may do so as effectually as their wards could have done, had they been under no disability. Further, guardians are allowed to disburden land of any burden over it, or of the obligation for feu-duties, etc. (sec. 8). Before the guardians can sell they must have the verdict of a jury, or a settlement by arbitration, or a valuation by two practical valuators. The purchase-money must be deposited in bank for the benefit of the parties under disability (sec. 9).

Special powers obtained by private Act of Parliament.

An Act of Parliament may also be obtained to authorize tutors to do some private act relative to the ward's estate, which the Court of Session will not or cannot grant their authority to do, and which may not have any object to recommend it further than the private emolument of the ward. Thus the Court of Session will not authorize a sale of the pupil's heritage, unless it be to obtain relief from the pressure of debts, or for some equally clamant cause. No probable advantage to be derived from such a proceeding will induce the Court to interfere; and in one case, therefore, an application

required to be made to Parliament for legislative authority to authorize a feu of the pupil's heritage, which promised to turn out greatly to his profit (*a*). The expense of obtaining such Acts has tended very much to repress applications for them.

SECTION II.

EXTRAORDINARY POWERS GRANTED BY THE COURT OF SESSION.

Jurisdiction of the Court as to granting extraordinary powers.

I. From a very early period the Court of Session have been in the habit of supplementing the powers of tutors, factors *loco tutoris*, and *curators bonis*, by authorizing these officers to perform something which they could not do at common law. The result of a great number of decisions may, according to the consulted judges in a late case, be stated to be, that wherever it has been made to appear that the power craved was either necessary to prevent serious loss to the estate, or expedient in order to secure evident and positive advantage (the act proposed to be done not being in this latter case an alienation of heritage), or where the interest of third parties connected with the estate required it, the Court will grant the powers necessary for accomplishing the object set forth in the petition to them. Even where only a contingent benefit was in view to the existing estate, and where there was no absolute necessity for the power, and no positive loss would have accrued from the refusal of it, the Court nevertheless granted the power craved (*b*). The Court will not grant excessive powers, nor will they listen to the plea from a factor *loco tutoris* that liability for the expenditure has been already incurred (*c*).

In one case the Second Division expressed great unwillingness to grant such extraordinary powers, whereby on an *ex parte* statement the authority of the Court might be obtained to very questionable proceedings (*d*). The power is one which the Supreme

(*a*) 3 Bell's Styles, p. 313. Here the copy of the Act is given.

(*b*) *Per* consulted judges in *Somerville*, 6 Feb. 1836, 14 S. 451. See the case referred to, *Craigie*, M. 16361 (1758).

(*c*) *Maitland*, 11 July 1863, 1 Macph. 1119.

(*d*) *Crawford*, 6 July 1839, Jur. In another case, the Second Division entertained 'the strongest doubts' of its power to grant authority to execute

Courts of the country ought to possess, otherwise the rules intended to benefit minors, by curbing the powers of their guardians, might become the cause of great loss and hardship to the minors themselves. In England the powers are exercised by the Court of Chancery. By the Roman law they were exercised by the Prætor (*a*); and the Court of Session, as the Supreme Court of Equity here, has, on the same grounds, all along asserted this jurisdiction. The right of the Court to do so was in an important case sanctioned by the opinions of the whole judges (*b*); and now by the Act 20 and 21 Vict. c. 56, s. 4, it is enacted that petitions and applications for special powers shall be presented to the Junior Lord Ordinary.

Who may apply for these powers.

II. All tutors, and among these are included fathers as administrators-in-law, may apply to the Court for extraordinary powers (*c*). The rules regulating the duties and powers of tutors being, however, long matured, the applications to the Court at their instance are few, in comparison to the large numbers at the instance of factors *loco tutoris* of pupils, and *curators bonis* of lunatics. These offices being comparatively of recent origin, the ordinary powers of the factor or curator do not appear to be well settled, and hence in all cases of doubt an application is made to the Court. With regard to minors, without curators or with them, the Court will grant them no extraordinary powers, as everything which they could authorize them to do they are entitled themselves at common law to perform (*d*). The parties who petition for the appointment of a factor *loco tutoris* cannot apply for extraordinary powers to him (*e*); nor can the commissioners of a guardian who has gone abroad (*f*).

Form of procedure.

III. In proceedings of this kind there is generally no contradictor to the process; and, in consequence, the Court may be induced on an *ex parte* statement to interpone their authority to

charters by progress in favour of vassals. *Fraser*, 3 Dec. 1835, F. C.

(*a*) Dig. xxvii. 9; Code v. 37, 22; Noodt, vol. ii. p. 587.

(*b*) *Somerville*, 6 Feb. 1836, 14 S. 451.

(*c*) *Finlayson* v. *Finlayson*, 22 Dec. 1810, F. C.; *Crawford*, 6 July 1839, 1 D. 1183; *Wilson*, 7 July 1835, 13 S. 1046; *Cockburn's Tutors* v. *Cockburn*, 10 March 1825, 3 S. 642; *Buchan*, 16 Dec. 1837, 16 S. 238, and 7 March 1839, 1 D. 637; *Forbes*, 22 Dec. 1838, 1 D. 355; *Woodrow*, 26 Feb. 1830, 8 S. 604.

(*d*) *Supra*, p. 335 *seq.*

(*e*) *Infra*, p. 499 (*a*).

(*f*) *Bell*, 7 March 1834, 12 S. 531.

there is a question of immediate aliment, the proper form, I take it, is a summary application. The lunatic is not to starve while an ordinary action is going on, or perhaps is carried to the House of Lords.' In several other cases have the Court granted authority to sell, merely on a summary application, and for the purpose of discharging pressing debts (*a*); and *a fortiori* would they authorize any act of minor importance on a summary petition. 'As to the question of form, the rule is, that the Court may entertain a summary application for authority to sell, if the necessity to sell is clear —a rule supported by several judgments' (*b*); but where the necessity is not clear, the Court will not proceed on a summary petition, but will require the institution of a regular action (*c*).

Notes to Junior Lord Ordinary instead of petitions.

A new form was introduced by the Pupils' Protection Act, which provides, 'That if at any time it shall appear to the factor that there is a strong expediency for granting abatement of rent, either temporarily or permanently, or for renewing or granting a lease for a period of years, or for draining, or for erecting buildings or fences, or for otherwise improving the estate in a manner not coming within the ordinary course of factorial management, he shall report the same to the accountant, who may order any necessary inquiry, and shall state his opinion thereon in writing; and such report and opinion may be submitted by the factor to the Lord Ordinary, with a note praying for the sanction of the Court to the measure proposed; and the Lord Ordinary shall, with or without further inquiry, report the matter to the Court, who, if they consider it expedient and consistent, with due regard to the amount of the estate at the time, may sanction the measure; and the decision of the Court shall not be subject to appeal.' 'And in all other matters in which special powers are according to the existing practice in use to be granted by the Court, the Court shall have power to grant the same in like manner and form as is above provided' (*d*). By the Court of Session (Scotland) Act, 20 and 21 Vict. c. 56, s. 4, the jurisdiction of the Court was transferred to the Junior Lord

(*a*) *Ferguson*, 14 Jan. 1636, 14 S. 213; *Finlayson*, *supra*; *Donaldson*, 8 March 1838, 16 S. 813; *Wilson*, 11 Dec. 1834, 14 S. 176; *Burnet*, 4 June 1836; *Allan*, 10 February 1854, 16 D. 534; *Scott*, 21 February 1856, 18 D. 624; *Wood*, 6 March 1856, 18 D. 732.

(*b*) *Per* Lord Ivory in *Mackenzie*, 18 Nov. 1853, 16 D. 60.

(*c*) *Mackenzie*, *ibid.*

(*d*) 12 and 13 Vict. c. 51, s. 7.

Ordinary, subject to a review of his judgment by reclaiming note to the Inner House. This note for special powers is accordingly dealt with and disposed of by the Junior Lord Ordinary. It has been found, that as far as regards applications for special powers in regard to those matters in which special powers were according to existing practice in use to be granted by the Court, procedure by note to the accountant is not imperative, but permissive only, and that petition is still competent (*a*).

Procedure on a summary petition.

The summary petition or note, as the case may be, must be presented to the Junior Lord Ordinary. It narrates the appointment of the petitioner to the office of factor or tutor, the circumstances which render the application necessary, and concludes that after intimation the powers craved should be granted (*b*). Where a note is the form used, it must bear reference to the opinion of the accountant on the proposed power. This petition or note appears in the motion roll; and the first order of the Lord Ordinary is, to ordain intimation of it to be made upon the walls and in the minute-book, and by service on the next of kin. The Court also order intimation to the cautioners of the petitioner (*c*); a proceeding which seems absolutely requisite for the protection of cautioners, as it has now been settled that they are liable for the tutors' or factors' abuse of the extraordinary powers (*d*). The provision in the Pupils' Protection Act is, that the Lord Ordinary 'shall order such intimation to be made as may be deemed proper' (*e*). The name and date of the original petition for the appointment of the factor ought to be stated in all applications by the factor for special powers (*f*).

After the expiry of the days of intimation, the Lord Ordinary, if no appearance be made, and there is no difficulty in the matter, will grant the authority craved. But if the application be opposed, or there seems to be anything peculiar or difficult, the Lord Ordinary may order such further inquiry before disposing of it as he may think proper. He may require the assistance of professional persons, or persons of science and skill (20 and 21 Vict. c. 56, s. 5).

(*a*) *Mackenzie*, 20 March 1862, 24 D. 844.

(*b*) See forms of these petitions in Appx.

(*c*) *Grant*, 7 Dec. 1844, Jur., Second Division case; *Rutherford*, 25 Jan. 1845, First Division case.

(*d*) *Infra*, Part vi.

(*e*) Sec. 8.

(*f*) *Scott*, 18 Jan. 1856, 18 D. 323.

If it be a matter of accounting, or some involved question which can only be elucidated by personal conference with the parties, the Lord Ordinary may remit it back to the accountant to report. In certain cases he may remit to the Sheriff to investigate the matter, to take proof and to report (*a*). The practice of the Court in regard to such remits is regulated by no precise rule. The most important powers have been granted without resorting to such a step (*b*). It is only when there is anything peculiar or suspicious in the application, or where the necessity of the authority required is not made apparent on the face of the petition, that further information will be demanded, and the necessary remit made. Now that the Court is in general applied to by note in the original petition, with the opinion of the accountant upon the proposed special powers, such further inquiry is unusual. The Pupils' Protection Act, however, provided that the Lord Ordinary, 'with or without further inquiry,' should report the matter to the Court; and under the Court of Session Act, 1856, the Lord Ordinary exercises the powers of the Court 'with or without further inquiry.' In cases of difficulty, the Lord Ordinary may report the matter to the Inner House, who may either themselves dispose of it on his report, or give him instructions as to his judgment. The judgment so pronounced by him is not subject to review; but any judgment on the merits pronounced without such report may be reclaimed against (*c*).

At what time may the application be made?

In some cases, the Court have granted extraordinary powers on the same petition which prays for the appointment of a factor *loco tutoris* or a *curator bonis;* and on the prayer of the next of kin, though not themselves appointed to the office (*d*). But this practice has been condemned as irregular, because the parties who petition for the appointment of such an officer have no right to crave any such authority, as they are not called on to administer the estate. The factor or curator himself must judge of the propriety of such an application after he has entered upon the duties of his office, as he

(*a*) *Finlayson* v. *Kidd*, 4 June 1835, 13 S. 861.

(*b*) *Fergusson*, 14 Jan. 1836, 14 S. 213; *Livingston*, 3 July 1835, 13 S. 1033.

(*c*) 20 and 21 Vict. c. 56, ss. 5 and 6.

(*d*) *Montgomery*, 29 January 1839; *Pulteney*, 21 Feb. 1832, 10 S. 362. See *supra*, p. 458, where the cases seem all to have been special powers granted at the time of appointment; also *Anstruther* v. *Anstruther*, 3 March 1818, F. C., and *Sawers*, 9 March 1850, 12 D. 905.

is the party who is responsible for the proceeding (*a*); and the Court now uniformly refuse to grant extraordinary powers on the same petition that asks the appointment of a guardian. 'The Court will appoint a *curator bonis*, with the usual powers. That is our present duty. When the curator is appointed, he will exercise his powers according to law; but what he shall do in the exercise of these powers is not in our determination now' (*b*). Under the Pupils' Protection Act, the refusal of special powers, except on application by the factor himself, is 'more clearly the proper course' (*c*). Where special powers have been granted on his own application to a factor who dies without exercising them, the Court, in appointing his successor, will at once confer such special powers on him (*d*).

Cases where the Court have granted authority.

IV. The cases where the Court have interponed their authority can be reduced to no precise order. The following illustrations will show the nature of the applications generally made to the Court. They consist chiefly of important and extraordinary acts of administration; for where the proposed act is one of ordinary management, the Court will not interfere, conceiving it 'not their province to superintend every common step respecting an estate' (*e*). It was observed in a recent case, that 'what were matters requiring special authority some years ago, are now matters of general management' (*f*).

Making up titles to property.

(1.) It is the duty, and it is within the power of tutors, to make up the titles of their ward to property to which he has succeeded, and this without any judicial authority (*g*). Accordingly there do

(*a*) *Hay and Others*, petrs., 10 Feb. 1829, 1 Jur. 69; *A. B.*, 27 Jan. 1829, 7 S. 327; *Pitcairn and Others*, 8 Dec. 1838, 1 D. 212; *Lawson* v. *Renfrew*, 27 June 1840, 2 D. 1226; *Brown*, 27 Nov. 1832, 11 S. 93; *Dyce*, 24 Nov. 1832, 5 Jur. 116; *Hay* v. *Boreland*, 11 March 1837, 15 S. 850; *Sinclair*, 29 June 1839, 14 F. C. 1058, note; *Roberts*, 11 July 1839, *ibid.*; *Robertson*, 7 Feb. 1833, 11 S. 365; *Douglas*, 14 Dec. 1839, 2 D. 238.

(*b*) *Per* Lord President (Hope) in *Dalrymple* v. *Ranken*, 25 June 1836, 14 S. 1013.

(*c*) *Kerr*, 7 Dec. 1849, 12 D. 266; *Beveridge*, 4 March 1851, 13 D. 952. See also *Robb* or *Hall*, 4 Dec. 1852, 2 Stu. 96; *Thomson*, 10 July 1857, 19 D. 964.

(*d*) *Raeburn*, 11 March 1851, 13 D. 951.

(*e*) *Home*, M. 16382 (1793); *Henderson*, M. 14982 (1803); *Ross*, 9 March 1820, F. C.; *Corson*, 10 July 1835, 13 S. 1093; *Woodrow*, 26 Feb. 1830, 8 S. 604, 1 Bell's Com. 133.

(*f*) *Per* Lord President M'Neill in *Esson*, 28 Feb. 1856, 18 D. 676.

(*g*) *Supra*, p. 230 *seq.*

not seem to be any reported cases where application was made by a tutor for the authority of the Court to do this; but the cases are numerous where such applications have been made by factors *loco tutoris* and *curators bonis* of lunatics, and the authority is in all cases granted after the usual preliminary intimations have been made. Some reason is generally assigned for the necessity to make up the titles, such as the call of a superior to take out an entry, or of vassals to give them an entry; to grant leases to tenants, or to exhibit a proper title in order to remove them; to give an effectual discharge to the debtor in an heritable bond who wishes to pay it up, or to execute the necessary conveyances in the division of a subject held *pro indiviso* (*a*). The Court have refused, without some cause shown for it, to grant such authority (*b*). The guardian may be authorized to make up titles in a particular way, such as to serve *cum beneficio inventarii* (*c*); and where the ward is heir-at-law of a person who has conveyed the property to trustees, the tutor or factor *loco tutoris* may be authorized to complete titles to the trust estate, and then convey it to the trustees, with a view of saving the expense of an adjudication in implement, the parties for whose behoof this is done freeing the pupil from all expense (*d*); and a tutor or judicial factor will be authorized to give in a renunciation for the pupil as heir to his predecessor (*e*). Where any difficulty occurs as to the mode of making up titles, the Court will not interfere by informing the tutor or factor as to what is the proper course, but will leave him to the advice of counsel, if he do not choose to act on his own responsibility (*f*).

Granting charters.

(2.) A tutor may, under his ordinary powers, renew the investitures of vassals (*g*); but it is the common practice, at least for

(*a*) *Anstruthers* v. *Anstruthers*, 3 March 1818, F. C.; *Mark*, 5 Dec. 1829; *Kerr*, 24 Jan. 1839; *Brown*, 5 Dec. 1840, 3 D. 188; *Cuthbertson*, 23 Nov. 1841, 4 D. 58; *Blâikie*, 1 Feb. 1827, 5 S. 268; *Campbell*, 20 Jan. 1829, 7 S. 296; *Chisholm*, 11 July 1835, 13 S. 1107; *Dykes*, 29 Nov. 1836, 15 S. 156; *M'Dougall*, 7 July 1837, 15 S. 1255; *Donaldson*, 8 March 1838, 16 S. 813; *Watson*, 3 Dec. 1839; *Grant*, 7 Dec. 1844, Jur.; *M'Donald*, 16 July 1845, Jur.; *Livingstone*, 3 July 1835, 13 S. 1033; *Dickson*, 11 June 1836, 14 S. 958; *Mackay*, 18 July 1848, 10 D. 1493; *Boyd*, 14 July 1855, 17 D. 1115.

(*b*) *Wilson*, 14 July 1853, 2 Stu. 559.

(*c*) *Somerville*, 6 Feb. 1836, 14 S. 451.

(*d*) *Mark*, 5 Dec. 1829, 8 S. 195.

(*e*) *Pyper*, M. 16330 (1711).

(*f*) *Hay* v. *Boreland*, 11 March 1837, 15 S. 850.

(*g*) *Supra*, p. 244.

factors *loco tutoris* and *curators bonis* of lunatics, to apply to the Court for authority to do this (*a*); although it has been expressly found that they may, under their ordinary powers, enter vassals (*b*).

Granting leases.

(3.) As a tutor cannot grant leases beyond the duration of his office, or a judicial factor beyond one year after his office has expired, it is obvious that the pupil's estate cannot be let in such a manner as to induce tenants to expend their capital in making improvements, or to embark in any settled scheme of agricultural management, which would require a sure period of possession for a number of years, to give them an adequate return. There is no case, accordingly, where judicial interposition is more frequently asked for, than to authorize leases for a settled period, varying according to the nature of the subject. Factors are required under the Pupils' Protection Act to apply to the Court when it appears to them that 'there is a strong expediency for granting abatement of rent either temporarily or permanently, or for renewing or granting a lease for a period of years' (*c*). In no case of an agricultural lease have the Court authorized one of longer duration than nineteen years (*d*); and authority in other cases has been granted for the lesser periods of thirteen (*e*), twelve (*f*), and seven years (*g*); and in the cases of entailed estates for the period allowed by the entail (*h*). In one case, where it was proposed to let the mansion-house along with the farm, and where it was difficult to get the one let without the other, the Court authorized the letting of both together either for eleven years

(*a*) *Wemyss*, 11 March 1829, 1 Jur. 140; *Pulteney*, 21 Feb. 1832; *Fraser*, 3 Dec. 1835, 14 S. 103; *Milne*, 10 June 1837, 15 S. 1104; *Fraser*, 6 July 1838, 16 S. 1271; *Brown*, 5 Dec. 1840, 3 D. 180; *Campbell*, 30 Nov. 1841, 4 D. 136; *Somervill*, 6 Feb. 1836, 14 S. 451; *Dykes*, 29 Nov. 1836, 15 S. 156; *M'Dougall*, 7 July 1837, 15 S. 1255; *Grant*, 7 Dec. 1844, 7 D. 182; *Hawkins*, 24 June 1848, 10 D. 1488, and 13 Dec. 1848, 11 D. 247.

(*b*) *M'Kay* v. *Houston* (1796), M. 16384.

(*c*) 12 and 13 Vict. c. 56, s. 7.

(*d*) See cases of leases authorized for nineteen years: *Ball*, 6 July 1837; *Forbes*, 22 Dec. 1838, 1 D. 355; *A. B.*, 27 May 1841, 16 F. C. 959; *Shepherd*, 23 Nov. 1844, Jur.; *Shepherd*, 10 July 1841, 16 F. C. 1288; *Shepherd*, 12 Dec. 1843, Jur. See cases as to tutors, *supra*, p. 256 *seq.* See also *Thriepland*, 7 June 1848, and *Mackay*, 18 July 1848, 10 D. 1234 and 1493.

(*e*) *Mackay*, 18 July 1848, 10 D. 1493.

(*f*) *Borthwick*, 7 June 1832, 10 S. 620; *Russell*, 3 March 1840, 2 D. 721.

(*g*) *Drummond*, 21 Jan. 1832, 10 S. 216; *M'Lean*, 25 June 1828, 6 S. 1018; *Brown*, 7 Dec. 1832, 11 S. 190.

(*h*) *Kerr*, 24 Jan. 1839, 14 F. C. 451; *Mackenzie*, 26 Jan. 1842, 4 D. 456; *Brown*, 11 Dec. 1846, 9 D. 250.

or for nineteen years, with a break on either side at the end of eleven years (*a*). In another case the lease was only allowed to be granted till the term next after the pupil's minority (*b*). Usually a special application is required on the occurrence of each letting; but where the estate consists of a number of small crofts, the Court will give the factor a general power to let them as the leases fall (*c*). In the case of mines, which cannot be beneficially let unless for a long term of years, the Court will grant their authority to let them for such time, however long, as men of skill report to be necessary to induce a tenant to take them at their value (*d*). The common course is to authorize the property to be let either by public roup or private bargain (*e*); and in order to induce the Court to interfere, it is usual to produce the report of valuators, or persons skilled in the subject, that it cannot be let at an adequate rent except for the period mentioned in the application to the Court (*f*).

Abatement of rents.

Where the former rent cannot be obtained for the property, the Court will authorize it to be let at a lower rate (*g*); and where the lands are let at an exorbitant rent, authority will be granted to reduce it to what men of skill report to be fair and reasonable (*h*); or to make an abatement from the rent for a particular year on account of general agricultural distress, or other similar cause (*i*). But this power of abating rents is one which the Court hesitate to grant (leaving it to the guardian's own discretion), as, however equitable towards a suffering tenant, it involves a positive loss to the pupil or lunatic; and accordingly in several cases they have refused such applications (*k*). Grave doubts of the propriety of

(*a*) *Hill*, 15 July 1851, 14 D. 13.

(*b*) *Fotheringham*, 10 July 1857, 19 D. 964.

(*c*) *Lindsay*, 13 Dec. 1855, 18 D. 205.

(*d*) *Roebuck* v. *Hamilton*, *ut supra*, p. 494; *Colt* v. *Colt*, M. 16387 (1800); *Moncrieff*, 11 March 1846, 8 D. 710, and 9 July 1851, 14 D. 13.

(*e*) *Drummond*, 21 Jan. 1832, and *Forbes*, 22 Dec. 1838; *M'Lean*, 25 June 1828; *Mackay*, *supra*.

(*f*) *M'Kenzie*, *supra*; and *Shepherd*, 12 Dec. 1843, Jur.

(*g*) *Milne*, 20 Dec. 1834; *Macgregor*, 7 June 1837; *Shaw*, M. 4070 (1750); *Tutor of Colzean* v. *Nearest of Kin*, M. 16282 (1670); *Anon.*, 9 March 1850, 12 D. 914

(*h*) *M'Gregor*, *ibid.*; *White*, 9 March 1849, 11 D. 1031; *Mackay*, 8 July 1852, 14 D. 983.

(*i*) *Annand* v. *Grant*, 7 March 1817, F. C.; *Tutor of Colzean*, *ut supra*; *Drummelzier* v. *Tweedale*, M. 16300 (1680). See this subject fully considered, *supra*, p. 258.

(*k*) *Anderson*, 28 Feb. 1822, 1 S. 363; *Gardner* v. *Montgomery*, 26 Jan. 1833, 11 S. 325; *Brodie*, 11 March 1843, 5 D. 1024.

the Court interfering to grant such powers were formerly entertained by some judges (*a*); but they were overruled, and legislative sanction has now been given to the Court 'granting abatement of rent either temporarily or permanently' (*b*). Where the leases contain any stipulations of a nature disadvantageous to the estate, authority may be granted to adopt another system, such as to alter a four-shift rotation to a five-shift (*c*). Instead of giving abatements from the rent, the guardian may think it more advisable to get the tenants changed; and judicial authority has been frequently granted to him to accept renunciations of leases from tenants who cannot properly fulfil the obligations contained in them, and to relet the subjects to others (*d*).

Renouncing leases.

On the other hand, where the pupil or lunatic is the tenant, and the subject is unprofitable, or cannot be properly managed, a renunciation of it into the landlord's hands will be authorized (*e*); and if it be of any value, the price or consideration given for the renunciation must be stated to induce the Court to interpone their authority (*f*). A subset and not an absolute renunciation may be resorted to, and will receive the sanction of the Court (*g*).

Sum fixed for aliment.

(4.) The Court will fix a sum to be paid for the ward's aliment, and for the maintenance and support of those who have such a claim against him, upon an application made to them for that purpose by his guardian (*h*). Along with authorizing the *curator bonis* of a lunatic to pay a yearly sum for his aliment, and for that of his wife and child, the Court authorized the curator to allow

(*a*) See *dicta* in *M'Gregor*, *infra*.

(*b*) 12 and 13 Vict. c. 51, s. 7.

(*c*) *M'Gregor*, 7 June 1837, 15 S. 1092.

(*d*) *Milne*, 20 Dec. 1834, 25 Feb. and 10 March 1836, 13 S. 222, and 14 S. 561 and 681; *M'Gregor, supra; Tutor of Colzean* v. *Nearest of Kin*, M. 16282 (1670); *Brown*, 11 Dec. 1846, 9 D. 250; *Wink*, 21 Jan. 1851, 13 D. 952.

(*e*) *Meikle* v. *Meikle*, 7 March 1823, 2 S. 274; *Carrick* v. *Warden*, 7 July 1829, 7 S. 848; *Blyth* v. *Craig*, Hume 889 (1808); *Grahame*, 20 Dec. 1851, 14 D. 312; *M'Ewan* v. *Crerar*, 17 Dec. 1852, 2 Stu. 137.

(*f*) *Robertson*, 14 Jan. 1841, 3 D. 345.

(*g*) *Slade*, 20 Dec. 1831, 10 S. 167.

(*h*) *Supra*, p. 481; *Grant* v. *Cameron*, 24 Feb. 1838 and 3 March 1840, 16 S. 652, and 2 D. 722; *Hamilton*, 9 Feb. 1842, 4 D. 627; *Russell*, 8 Feb. 1850, 12 D. 913; *A. B.*, 6 March 1858, 20 D. 778. See also *Stuart* v. *Court*, 10 June 1848, stated *supra*, p. 109; and *Stewart*, 20 Nov. 1852, 15 D. 37, where such applications were refused, being on behalf of parties who had no legal claim on the lunatic; and *Aitkenhead*, 28 Feb. 1852, 14 D. 584, where it was refused until claim was constituted in an action of aliment.

£5 to the brother of the lunatic, as his travelling expenses when visiting him (*a*). Money for aliment will not be ordered to be sent to parties abroad, who offer to make provision for the ward, if that would take away from this country all his funds (*b*). Even where the lunatic resides out of the country, and a committee has been appointed by the English courts, the Court of Session will not authorize the transmission to him of more than is required for the lunatic's support (*c*).

Alienation of heritage.

(5.) At different times the Court have been 'induced by plausibility of statement' (*d*) to sanction sales and alienations, by way of feus, of the pupil's heritage, when this appeared to be for his utility or advantage, and although no poverty of circumstances rendered it an indispensable act. Thus, a tutor having granted a feu of eighty acres of the pupil's estate to David Dale, the proprietor of the cotton works at Lanark, an action was raised to obtain the authority of the Court interposed to the transaction, in which all interested were called as defenders. A proof was taken, and it appeared that the feu-duty exceeded the rent four times; and therefore the Court found and declared, 'that the feuing of the said lands, in terms of agreement entered into with the said David Dale, is for the *utility and advantage* of the said pupil, and authorized, and hereby authorize, the pursuers to feu to the said David Dale the said lime-fields.' It turned out afterwards that this was only a transaction of 'apparent advantage,' but of real loss, to the pupil, and that the Court were in consequence placed in the awkward predicament of being obliged to reduce the very agreement to which they had interposed their own authority (*e*). In a leading case, which shortly thereafter followed, they unanimously laid it down as law, 'that great necessity was the only ground on which the Court could authorize the sale of a minor's estate, and that no views of expediency, however clear, were sufficient' (*f*). The word 'necessity,' here employed, has been interpreted by the Court

(*a*) *Hamilton, ibid.*

(*b*) *Dalrymple*, 9 March 1837, 15 S. 769.

(*c*) *Murray* v. *Baillie*, 24 Feb. 1849, stated *supra*, p. 239.

(*d*) *Per* Court in *Finlayson* v. *Finlayson*, 22 Dec. 1810, F. C.

(*e*) *Vere* v. *Dale*, M. 16389 (1804), 1 Bell 138, n. 2. See *Moncreiff* v. *Milne*, 16 July 1856, 18 D. 1291, note of Lord Ordinary.

(*f*) *Finlayson* v. *Finlayson*, 22 Dec. 1810, F. C., 1 Bell 133, n. 2.

themselves to mean 'where the sale is necessary for payment of debt for the minor's aliment, and in cases of urgency to avoid loss' (*a*). This is in accordance with the early authorities (*b*). In such cases the judicial authority may be regarded as only an anticipation of what might be afterwards accomplished by the diligence of the pupil's creditors at greater disadvantage to him (*c*). In the case of *Colt*, which was an application to sanction an original feu, from which great advantages were expected, the Court were clear that they ought not to interpose their authority to a feu granted by the tutor, because it was a project the propriety of which 'may admit of opposite views, and therefore the pursuer must either take the risk of after challenge on himself, or apply for an Act of Parliament.' They found the action incompetent, and dismissed it, 'in respect that the contract libelled is an act not of necessary administration, but of discretionary power exercised on the part of the tutor, in the view of ultimately promoting the benefit of the pupil' (*d*).

The Court have repeatedly applied this principle of late years, invariably refusing the application when the circumstances showed only expediency, not legal necessity (*e*). 'The rule is not to give factors powers beyond what they have at law for the mere purpose of making profit. A case of necessity is what we require to be made out, and not a mere matter of speculation of making profit at a future time' (*f*). Where, however, the circumstances are such as to satisfy the Court that the proposed sale is necessary, their authority will be interponed. Thus, where pupils were entitled to the fee of an estate, and the property was being deteriorated by mineral workings underneath, and a claim of compensation resulted in a transaction by which the surface property was to be conveyed to the mineral owner, the Court authorized the administrator of the children to consent, holding that it amounted to legal necessity.

(*a*) *Colt* v. *Colt*, M. App. *v.* Tutor 1 (1801).

(*b*) Stair i. 6, 18; Bankt. i. 7, 29; Bruce's Tutor's Guide, p. 338.

(*c*) 1 Bell's Com. 133.

(*d*) *Colt* v. *Colt*, *supra*, 1 Bell's Com. 133.

(*e*) *Stott*, 20 July 1849, 11 D 1495; *dicta* in *Boyle*, 19 Feb. 1853, 15 D. 420, 2 Stu. 240; *Watson*, 28 Nov. 1856, 19 D. 98; *Auld*, 5 Feb. 1856, 18 D. 732; *Maconochie*, 4 Feb. 1857, 19 D. 366; *Lawson*, 20 Feb. 1863, 1 Macph. 424.

(*f*) *Per* Lord Curriehill in *Auld*, *supra*.

The Lord President (M'Neill) observed: 'The reasons given by the reporters make out a case of substantial necessity; for it appears that the estate will be greatly deteriorated if this transaction is not proceeded with' (*a*). This case has been described as 'exceedingly instructive, as explanatory of the general grounds on which the Court have been in use to proceed in granting powers to interfere, either by loan or sale, with a pupil's or ward's heritage' (*b*).

The power of the Court to grant such authority was fully considered and maintained in the case of *Maconochie*, which went to the whole Court. Much interesting discussion, with an exhaustive examination of precedent, is to be found in the opinions of the judges. The Lord President (M'Neill) thus stated his views: 'Having reviewed all the authorities and cases I know of bearing on the point, and having in view the provisions of the Pupils' Protection Act, I am of opinion that it is competent for the Court to grant power to a *curator bonis* to borrow money on the real security of the heritable estate of the person under curatory, where it is made clear to the Court that the interests of the person under curatory, or of his estate, will be exposed to serious loss or injury, which cannot otherwise be averted, but from which they may be protected by the intervention of such aid. But while I am of opinion that it is competent for the Court to protect those interests, and that it has been in use to do so, by granting such power when necessary for that purpose, I am not of opinion that it is competent for the Court to grant such power for the mere purpose of avoiding inconvenience, or of facilitating operations from which gain or profit may be expected' (*c*). The other judges concurred generally in these views; but as the circumstances of the case did not amount to the required necessity, the application was refused. In a case which occurred immediately afterwards, the sale was shown to be necessary, as well for the benefit of the lunatic as to prevent absolute loss to the estate. A case was made out, not only of necessity for a sale to prevent loss to the estate, but also for the sake of the lunatic. The medical man reported that the lunatic

(*a*) *Muller* v. *Dixon*, 11 Feb. 1854, 16 D. 536.

(*b*) *Per* Lord Cowan in *Maconochie*, 19 D. 378.

(*c*) *Maconochie*, 4 Feb. 1857, 19 D. 366.

desired many things which his income would not afford him. The Court held that his interests thus required the property to be sold, that he might have such comforts as his means entitled him to enjoy (*a*). The paying off of debt, or the provision of a proper aliment for the pupil or ward, are the usual purposes to effect which the Court interposes its authority to a sale of heritage (*b*). The sale ought in all cases to be by public roup (*c*).

In one case, the Court refused to authorize an original feu, because it was justified by no absolute necessity (*d*); but in another case, where the circumstances were different, the authority was granted. A tutor was authorized to feu a small piece of ground, which could be done with very great advantage, by concurring in a general feuing plan with the heritors of the adjoining grounds; but if these proprietors had feued their grounds separately, the value of the pupil's property would have been deteriorated, and therefore the interposition of the Court was here made, not upon any speculative grounds as to obtaining profit, but *rei servandæ causa* (*e*).

In a later case, the authority to feu was refused, on the ground that, however great the expediency of feuing, the Court would not authorize it where there was no absolute necessity made out. The Lord President observed: 'I can understand a case where actual loss to an estate would be a reason for granting such power as we can grant. But while actual loss would lead us to decide the other way, this ground may have been acquired with the object of eventually feuing it to advantage, although there was a present loss' (*f*). In a recent case, the Court not only authorized a *curator bonis* of a lunatic to complete feuing transactions entered into by the lunatic, but also gave him power to carry out the feuing plans contemplated by the lunatic, the agricultural value of the remaining lands having been decreased by the feuing operations previously completed (*g*).

The Court will not, without due cause shown, authorize an

(*a*) *Lindsay*, 17 Feb. 1857, 19 D. 455.

(*b*) *Kirkland*, 6 June 1848, 10 D. 1232; *Dunbar*, 7 July 1847, 9 D. 1426; *Wood*, 6 March 1856, 18 D. 732; *Lindsay*, *ibid.*

(*c*) *Arthur*, 30 June 1846, 8 D. 943; *dicta* in *Auld*, 18 D. 487; *Lindsay*, *supra*.

(*d*) *Thomson*, 10 March 1837, 15 S. 807.

(*e*) *Penn* v. *Auld*, 1818, referred to in Darling 581.

(*f*) *Watt*, 23 Feb. 1856, 18 D. 652.

(*g*) *Alexander*, 26 June 1857, 19 D. 888.

alienation of heritage, although the pupil's father in the deed nominating the tutors gave them full power to sell the lands, 'in case they should find it for the interest of my children so to do.' The tutors were satisfied that a sale of the lands would be highly beneficial for the pupil; but as they, being only tutors, were not vested in the property, and as the pupil, from nonage, could not dispone, they craved the authority of the Court to authorize them to sell, maintaining that as the pupil's father had constituted them the judges of the expediency and time of sale, there was no necessity for leading a proof of its expediency or propriety. But the Court 'were of opinion, that even in these circumstances it was proper to have a proof of the condition of the estate and affairs of the deceased, and they therefore remitted to Lord Glenlee to allow a proof' (*a*). If, after this proof, it turn out that there is no absolute necessity to sell on account of debt, the authority craved will be refused, even although the pupil's father intended to dispose of the property (*b*). Where debt is the ground upon which the Court is asked to authorize a sale, the tutor must establish (if the Lord Ordinary insist for evidence to support the petition) that the ready money, the rents, the debts owing to the minor, and his other moveables, are not sufficient to discharge what he owes. If it be proved that these are insufficient to meet the pupil's obligations, the sale will be authorized (*c*). Where the debt is trifling, the Court will not authorize a sale, if a small loan will remove the temporary embarrassment (*d*).

The same rules are applicable to those cases where the expenses of the pupil's education and aliment cannot be covered by the annual returns from the estate, or by a loan (*e*). And so also will a sale be authorized where the property cannot be retained without loss

(*a*) *Fraser* v. *Fraser*, 4 July 1810, Hume 889. See *Cockburn's Tutors*, 10 March 1825, 3 S. 642; *Auld*, 18 D. 487.

(*b*) *Montgomery*, 29 Jan. 1839.

(*c*) *Finlayson* v. *Kidd*, 4 June 1835, 13 S. 861, and 16 Jan. 1836, 14 S. 219; *Ferguson*, 14 Jan. 1836, 14 S. 213; *Donaldson*, 8 March 1838, 16 S. 813; *Wilson*, 11 Dec. 1834, 13 S. 176; *Burness*, 30 June 1836, 14 S. 1057.

(*d*) *Finlayson* v. *Finlayson*, 22 Dec. 1810, F. C.; *Drysdale* v. *Drysdale*, 30 June 1831, Jur.; *Stott*, 20 July 1849, 11 D. 1495.

(*e*) *Finlayson* v. *Kidd*, *supra*; *Maconochie*, 15 July 1853, 2 Stu. 567, *supra*, p. 234. But see *Thriepland*, 7 June 1848, 10 D. 1234, where such authority was refused as to wood past its maturity on account of the then state of the wood market.

on account of its deterioration in value (*a*). Powers of sale were given to a judicial factor of property which consisted of unfinished houses, exposed to immediate deterioration unless a large sum was expended in finishing them, to do which the factor had no funds (*b*).

Alienation of moveables.

(6.) A tutor is entitled at common law to sell moveable property (*c*); but applications have been made to the Court by judicial factors for authority to dispose of bank stock to discharge debts (*d*). In one case the Court refused as unnecessary a petition by a *curator bonis* for authority to transact as to the lunatic's moveables (*e*).

Purchases of lands.

(7.) In investing the pupil's or lunatic's money, it may often form the best mode to invest it in the purchase of lands; and the authority of the Court has been given to such an act (*f*). The decision to this effect was much opposed at the time (*g*); and perhaps the Court would now leave the guardian to do such acts on his own responsibility (*h*). The Court recently authorized a *curator bonis* to purchase the Crown's right in the alveus of a river lying in front of the lunatic's property, there being an opportunity to effect the purchase under a joint arrangement with the neighbouring proprietors (*i*). To invest the pupil's funds in house property is considered an act of mal-administration (*k*), and in all probability would in no case be sanctioned by the Court.

Borrowing money.

(8.) When the pupil is in debt, and the creditors are demanding payment of their money, and no ready funds exist for that purpose, or where he has no fund for his aliment and education, the Court have authorized the borrowing money instead of selling the pupil's heritage. The factor or tutor in these cases will be authorized to grant the bonds in any equitable mode in which the creditor making the loan is willing to take them. If the pupil has property, the bond will be granted as a security over it (*l*). The competency

(*a*) *Plummer* v. *Tutors*, M. 16358 (1757); Ersk. i. 7, 17, with Ivory's note as explanatory of the case; Bell's Prin. 2084.

(*b*) *Ferguson*, 14 Jan. 1836, 14 S. 213.

(*c*) *Supra*, pp. 234 and 246.

(*d*) *Hamilton*, 16 Feb. 1839, 1 D. 520; *Mathieson*, 26 June 1857, 19 D. 917; *Accountant of Court* v. *Geddes*, 29 June 1858, 20 D. 1170.

(*e*) *Corson*, 10 July 1835, 13 S. 1093.

(*f*) *Craigie*, M. 16361 (1758).

(*g*) See *Rattray*, 5 Sup. 442.

(*h*) *Supra*, p. 241.

(*i*) *Watt*, 23 Feb. 1856, 18 D. 652.

(*k*) *Supra*, p. 475.

(*l*) *Wilson*, 7 July 1835, 13 S. 1046; *Somervill*, 6 Feb. 1836, 14 S. 451; *Borthwick*, 7 June 1832, 10 S. 620; *Agnew*, 8 June 1837, 15 S. 1094; *Hamilton*, 16 Feb. 1839, 1 D. 520, F.

of granting such authority was established, and the nature of the cases in which the Court will interpose by granting authority was fully explained, in the case of *Maconochie* (*a*), where, however, the circumstances did not amount to legal necessity, and the power sought was refused. Such bonds have been authorized in order to obtain money to put the property in repair (*b*), or to complete unfinished buildings (*c*). A factor *loco tutoris* or *curator bonis* who obtains authority to borrow on the security of the estate is not entitled, without the express authority of the Court, to insert a power of sale in such bond (*d*).

Insurances on minor's life. Purchase of annuities.

Loans of a peculiar character have been authorized in order to obtain an alimentary fund for the pupil or lunatic. These are generally in those cases where there are no present funds, but where the ward is presumptive heir to a lucrative succession, or where, having small funds, they may not afford a subsistence, unless sunk in an annuity with an insurance office. Authority has been granted to a factor *loco tutoris* of a pupil destitute of all means of livelihood, but who was heir presumptive to an entailed estate of £800 a year, to insure the pupil's life against that of the heir in possession for £500, and immediately to borrow one-half of the sum on the security thereof, to be applied towards the pupil's maintenance and education (*e*). So likewise, in other cases where the pupils were similarly situated, in not having present funds to give them maintenance, the Court have authorized transactions with reversionary insurance offices. Where a present annuity was granted to the pupil by the office, on condition of his paying them a certain sum after succeeding to an entailed estate, of which he was presumptive heir, and of his tutor's granting bond binding him to pay, and to grant a security over the entailed estate, and the rents thereof to become payable on his succeeding, the Court interponed their authority to the transaction (*f*). Where, again, the pupil or

C.; *Stott*, 19 July 1849, 11 D. 1495; *Mackenzie*, 18 July 1848, 10 D. 1493; *Thriepland*, 7 July 1848, 10 D. 1234; *Campbell's Curator*, 11 Dec. 1851, 14 D. 313; *Wood*, 13 Feb. 1857, 19 D. 428.

(*a*) 4 Feb. 1857, stated *supra*, p. 506.

(*b*) *Crawford*, 6 July 1839, 1 D. 1183.

(*c*) *Tweedie*, 16 Jan. 1841, 3 D. 369.

(*d*) *Stewart* v. *Kirkcaldy*, 13 Nov. 1849, 12 D. 73.

(*e*) *M'Gruther*, 27 Feb. 1835, 13 S. 569.

(*f*) *Miller*, 26 Nov. 1836, 15 S. 147; *Earl of Buchan*, 16 Dec. 1837, 16 S. 238, and 7 March 1839, 1 D. 637.

lunatic has small funds, authority will be granted to purchase an annuity with them, if this seem in the circumstances to be the most advisable course of investment (*a*).

Uplifting heritable bonds.

(9.) The Court will grant authority for this purpose where it seems necessary; and it is so in those cases where the debtor insists on paying up the money (*b*), or where the father of the pupil has ordered the money to be uplifted (*c*).

Miscellaneous cases.

(10.) Authority has been granted to rebuild farm-offices, the return for the expenditure on which would be 10 per cent.; and to make repairs upon the mansion-house (*d*), and to complete buildings left unfinished at the death of the pupil's father (*e*); to execute the necessary dispositions and other deeds towards the winding up of a company in which the ward was a partner (*f*); to compromise a claim by accepting part of a debt in payment of the whole (*g*); to compromise an action (*h*), although this is usually left to the discretion of the factor; and the curator of a fatuous parish minister has been authorized to pay a sum to an assistant (*i*). The Court granted authority to the *curator bonis* of a lunatic, in regard to whose legitimacy and right to extensive landed estate a long litigation had taken place, in which he was ultimately successful, to pay out of the estate the expenses of the unsuccessful party, in terms

(*a*) *Finlayson* v. *Kidd*, 16 Jan. 1836; *Innes*, 17 July 1846, 8 D. 1219; *Towers*, 17 Feb. 1848, 10 D. 720; *M'Gilchrist*, 13 June 1855, 17 D. 917; *Paisley*, 5 March 1857, 19 D. 653.

(*b*) *Duncan*, 11 Dec. 1838, 14 F. C. 203; *Watson*, 3 Dec. 1839, 15 F. C. 167; *Brown*, 5 Dec. 1840, 3 D. 188; *Turnbull*, 22 Dec. 1838, 14 F. C. 388; *Allardice*, 18 July 1848, 10 D. 1493; *Grant*, 17 Jan. 1849, 11 D. 1038; *Wood*, 6 March 1855, 17 D. 580; *Smith*, 17 July 1846, 8 D. 1220. See 10 and 11 Vict. c. 50. *Curle and Paterson*, 13 D. 952.

(*c*) *Mark*, 5 Dec. 1829, 8 S. 195.

(*d*) *Ball*, 24 Nov. 1838, 1 D. 109. See also *Hood*, 6 Feb. 1850, 12 D. 914; *Mackay*, 8 July 1852, 14 D. 983; and *Robertson*, 14 July 1855, 17 D. 1116, where authority was granted to borrow for the improvement of the estate. The statute 12 and 13 Vict. c. 51, s. 7, provides that the factor shall not be authorized to charge estate to greater extent than one-half what the ward himself could have done. Effect was given to this in *Mackay*, *supra*. In *Maitland*, 11 July 1863, 1 Macph. 1104, the Court refused an application for authority to make large improvements on the mansion-house.

(*e*) *Tweedie*, 16 Jan. 1841, 3 D. 369.

(*f*) *Ellis*, 14 Dec. 1836, 15 S. 262; *Dickson*, 11 June 1836, 14 S. 958.

(*g*) *Dalmahoy*, 9 July 1836, 14 S. 1125.

(*h*) *M'Dougall*, 24 June 1853, 15 D. 776, 2 Stu. 477; *Anderson*, 29 June 1857, 19 D. 329.

(*i*) *Hamilton*, 24 Nov. 1838, 1 D. 110.

of an arrangement which had been entered into prior to the litigation (*a*). Power has been given to enclose and plant part of a hill, and for this purpose to erect a wire fence (*b*). The Court have also authorized a judicial factor to grant annuities to aged tenants who without this would have become paupers, supported by the parish almost at the sole expense of the proprietor of the estate (*c*).

The factor *loco tutoris* of a peer was in one case empowered to purchase from the executors of the late peer the family pictures and library, and from the tenant of the principal mansion certain articles of furniture, with a view to more easily letting the house (*d*). The *curator bonis* of a lunatic was authorized to borrow money to pay for a commission for his only son, he granting bond to his sister in case of loss arising to the estate (*e*). The ground on which the Court proceeded in this case was, apparently, that in so doing they were carrying out the wishes of the father, who had educated the son for the army. In a subsequent application by the curator on the same estate for authority to purchase a captain's commission, the Court refused to interfere, holding that the case was not one of necessity, so as to authorize any further burden upon the estate, and leaving the son to obtain the necessary advance among his friends. The Court have often authorized acts of extraordinary management to enable the factor or curator to carry out and give effect to an arrangement made by the ward before his incapacity, or by the father of the pupil before his death (*f*).

Authority has been granted to a guardian of a pupil heir to collate heritage with the executors (*g*); but in such cases as this, where there is an election between two courses, the Court hesitate to interfere (*h*); and they would not do so, in regard to an election between legitim and a provision declared to be in lieu of it (*i*), except the interest of the heir could be shown to be manifest in

(*a*) *Aikman*, 17 July 1863, 1 Macph. 1140.

(*b*) *Esson*, 28 Feb. 1856, 18 D. 676.

(*c*) *Boyle*, 5 June 1855, 17 D. 790.

(*d*) *Boyle*, 11 March 1852, 14 D. 764.

(*e*) *Maconochie*, 15 March 1861, 23 D. 740.

(*f*) *Alexander*, 26 June 1857, 19 D. 888; *Howe*, 12 Feb. 1859, 21 D. 486; *Allan*, 10 Feb. 1854, 16 D. 534; *Mark*, 5 Dec. 1829, 8 S. 195; *Aberdeen* v. *Laird*, 26 Nov. 1823, 2 S. 527; *Livingstone*, 3 July 1835, 13 S. 1033; *Boyle*, 11 March 1852, 14 D. 764; *Crighton*, 13 Feb. 1857, 19 D. 429.

(*g*) *Robertson*, 14 Jan. 1841, 3 D. 345; *Donaldson*, 8 March 1838, 16 S. 813.

(*h*) *Ibid.*

(*i*) *Cowan* v. *Turnbull*, 26 Jan. 1844.

favour of the proposed election, or where it might suffer by delay (*a*); nor would authority be granted to institute an action of reduction of a deed (*b*). This is a matter which the guardian must take on his own risk, and he may competently institute such an action without judicial authority (*c*). And the Court would not authorize the factor to carry on an extensive manufacturing establishment (*d*). Where it appeared to be for the advantage of the pupil to get quit of connection with a joint-stock company, the factor was authorized to pay a sum out of the pupil's funds to a party who, on receipt of payment, was willing to accept a transfer of the shares held by the pupil, and to relieve him of all liabilities on account of the shares (*e*).

Effect of the interposition of the Court.

V. Where a tutor, or factor *loco tutoris*, or *curator bonis*, does any act not within his ordinary powers of management without having first obtained the authority of the Court, the act will be reduced, or at least the guardian must take the whole responsibility on himself (*f*).

The interposition of the Court does not operate much. It merely puts the guardian in *bona fide;* but it does not free him from responsibility, or render the act authorized unchallengeable by the minor on his proving lesion; and there have occurred cases where the whole proceedings authorized by the Court were reduced afterwards by the minor. The whole of this jurisdiction of the Court of Session is based upon the practice of the Courts of the Roman Prætors; and the rule of the Roman law was clear, that deeds authorized by the judge could afterwards be reduced *ex capite læsionis* by the minor (*g*). This doctrine is expressly sanctioned by Lord Stair (*h*), and is supported by many other authorities (*i*). In *Vere* v. *Dale*, where the Court first authorized

(*a*) *Cowan* v. *Turnbull*, 13 June 1845, 7 D. 872; aff. 17 March 1848, 6 Bell 222. The *c. b.* is not bound to collate.

(*b*) *Howie*, 6 Dec. 1826.

(*c*) *Supra*, p. 480 (*k*).

(*d*) *Philip*, 22 Nov. 1827, 3 S. 83.

(*e*) *Lindsay*, 9 Dec. 1848, 11 D. 232.

(*f*) *Lambe* v. *Chapman*, 24 June 1834, 12 S. 775.

(*g*) Dig. xxvii. 9, 5, 15; Dig. xxvii. 9, 7, 3; Code v. 71, 5.

(*h*) Stair i. 6, 18.

(*i*) *Per* Fountainhall in *Cumming*, 4 Sup. 459; *per* Court in *Finlayson* v. *Finlayson*, 22 Dec. 1810, F. C.; *per* Court in *Wallace* v. *Wallace*, 8 March 1817, F. C.; *per* Lord Medwyn in *Crawford*, 6 July 1839, F. C.; *per* Court in *Eaton* v. *Murdoch*, 9 June 1826, 1 S. 677. Ivory's note to Ersk. i, 7, 17; correct Ivory, Form of Process, vol. i. p. 344, footnote.

a feu of the estate, the pupil, 'when he came of age, being dissatisfied with the conduct of his tutors in this transaction, brought an action of reduction against Mr Dale upon several grounds, but chiefly as being *ultra vires* of the tutors, and therefore *ultra vires* of the Court to authorize it.' The Court reduced their former decree authorizing the feu right, 'as this measure was at the best only an object of apparent advantage, but not of urgent necessity to the pupil's affairs' (*a*). In another case, where extraordinary powers were craved, Lord Corehouse said: 'If the interlocutor granting this application were so qualified as to show that it is understood by the Court, and must be understood by the country, that the judicial factor is not exonerated of responsibility by obtaining the sanction of the Court as now prayed for, I have no objections to grant the petition. But if our judgment is to take off that responsibility, we should have the facts thoroughly investigated in each individual case before we interpose our authority' (*b*). In another case, the Court, while they granted the power craved, reserved all questions in regard to the responsibility of the curator as to how he exercised it (*c*). A still more decided opinion, to the same effect, was given by the majority of the First Division in another late case. They held that 'it was the party who applied for the authority who was responsible for the consequences. Whatever was in such cases demanded of the Court, was done *periculo petentis*, as the Court could not be supposed to be aware of all the circumstances' (*d*). In a late case it was observed: 'There is always a difficulty about these sales. Although we do grant the power, it does not necessarily grant a good title' (*e*).

(*a*) *Vere* v. *Dale*, M. 16389 (1804).

(*b*) *Milne*, 10 June 1837, 15 S. 1104.

(*c*) *M'Gregor*, 7 June 1837, 15 S. 1092.

(*d*) *Eaton* v. *Murdoch*, 9 June 1826, F. C.

(*e*) *Per* Lord President M'Neill in *Auld*, 5 Feb. 1856, 18 D. 487.

PART SIXTH.

CAUTIONERS FOR TUTORS, JUDICIAL FACTORS, AND MINORS.

CAUTIONERS are required for tutors-at-law, tutors-dative, curators, factors *loco tutoris*, and *curators bonis*. Sometimes the cautioner binds himself simply as such; sometimes he is bound as full debtor, or conjunctly and severally with the principal; and if there are more cautioners than one, they are, in like manner, either bound simply as cautioners, or conjunctly and severally. Like all other contracts, a cautionary obligation may be set aside on the ground of fraud. This was settled in a case where it was strenuously maintained by the succeeding *curator bonis* that the fraud being that of the curator, it could not receive effect to take away the benefit of the cautionary obligation from the estate of the lunatic, who was no party to the fraud (*a*).

Extent of a cautioner's liabilities.

I. (1.) Where there is but one cautioner, who becomes bound expressly as such, he is entitled to demand that the principal shall first be discussed before any claim is made upon him (*b*). (2.) Again, if the cautioner be bound, *conjunctly and severally* with the principal, he may be sued, without the creditor being under the

(*a*) *Wardlaw* v. *Mackenzie*, 10 June 1859, 21 D. 940.

(*b*) *Smith*, 1 Sup. 34 (1626); *Crosbie* v. *Finlay*, 1 Sup. 238 (1627); *Ritchie* v. *Paterson*, 1 Sup. 308. See M. 3580 (1629); *Town of Aberdeen* v. *Dyvvie*, M. 2090 (1677); *Wright and Anderson* v. *O'Harly*, 8 Feb 1827; *Macdonnell* v. *Ranken*, 7 July 1829, 4 S. 1148; *Wishart* v. *Wishart*, 13 May 1837, as reversed, 2 S. and M'L. 564. 1 Ross' Lectures, p. 74; Ersk. iii. 3, 61. *Balcarras* v. *Seaforth*, 1 Sup. 568 (1668); *Sandilands* v. *Divvy*, M. 3580 (1677). Stair i. 17, 4 and 6; 1 Bell's Com. 347. See different rule in matters of 'trade and commerce,' 19 and 20 Vict. c. 60, s. 8.

necessity of first discussing the principal (*a*). (3.) In the case where there are *several sureties*, bound expressly as *cautioners*, they have not only the benefit of discussion, but they have also the benefit of division; that is, each is only liable for his own share of the debt, and cannot be called on by the creditor to pay more, unless in the case where, from the insolvency of one cautioner, the rest must contribute *pro rata* for his share (*b*). (4.) Where, again, a number of cautioners are bound as co-principals,—that is, where they are bound conjunctly and severally, or as full debtors with the principal obligant,—they thereby renounce both the benefit of discussion and the benefit of division, and consequently any one may be sued for the whole debt (*c*).

From the forms in the Books of Styles (*d*), it will be observed that the duty of the tutor or factor, for the performance of which the cautioner becomes bound, is expressly laid down; and particularly, the obligations which cautioners for judicial factors and curators must undertake, were specially appointed by Act of Sederunt (*e*). Such detailed statement is, however, not absolutely essential. In one case the obligation merely was, that the factor 'shall do exact diligence in performing my duty as factor foresaid,' conform to the Act of Sederunt; and this was held as broad and comprehensive as if it had minutely detailed the particulars of the factor's duty (*f*).

Caution required by Pupils' Protection Act.

The terms of the bond of caution for factors *loco tutoris*, *curators bonis*, and tutors dative and at law, are regulated by the Pupils' Protection Act. Sec. 2 enacts, that every judicial factor shall 'find caution for his duly accounting for his intromissions and management, and observing and performing every duty incumbent upon him as factor, in terms of the rules prescribed or to be prescribed for the discharge of his office.' Sec. 26 enacts, that 'in

(*a*) 1 Ross Lec. 74 *seq.* *Wallace* v. *Landers*, M. 2096 (1707). Ersk. iii. 3, 61; Stair i. 17, 4; 1 Bell's Com. 345–6.

(*b*) Ersk. iii. 3, 63; *Lockhart* v. *Semple*, Elch. *v.* Caut. 9 (1738); 1 Bell's Com. 347.

(*c*) 1 Ross Lec. p. 78 *seq.*; Ersk. iii. 3, 61. *Dunbar* v. *Dundee*, M. 3584, 2 Sup. 137 (1665); *Montgomerie* v. *Brown*, M. 3586, 2 Sup. 137 (1713); 1 Bell's Com. 345.

(*d*) 2 Jurid. Styles 79 and 84, and 86; and 1 Jurid. Styles 423 and 432.

(*e*) Act of Sederunt, 17 Jan. 1730.

(*f*) *Kerr* v. *Bremner*, *supra*, p. 399, as in (*c*). This point was decided in the Court of Session, and not appealed. See Sess. Papers. *Lambe or Ritchie* v. *Ritchie*, 14 Dec. 1837, 16 S. 219.

every service of a person as tutor-of-law to a pupil, or as curator to an insane person or idiot, there shall, besides the obligations usually inserted therein, be inserted in the bond of caution, taken by the clerk in such service, an obligation to observe and perform every duty incumbent on such person, in terms of the rules prescribed or to be prescribed for the discharge of his office, in all respects, together with a consent to registration in the Books of Council and Session for execution;' . . . 'and in bonds of caution to be taken in the Court of Exchequer from tutors-dative to pupils or insane persons or idiots, there shall, besides the usual obligations, be inserted an obligation to the effect aforesaid.'

Cautioners liable for acts of extraordinary administration.

Under his obligation, there can be no doubt of the cautioner's liability for all acts of ordinary management. Where the acts are those of extraordinary administration, the same rule also holds; and such acts are held to be included under the obligation of faithful performance of the office. In several instances the liabilities of the cautioner may thus be increased, to an extent of which no definite idea can be entertained, at the time the bond of caution is granted. Thus, in one case, the *curator bonis* of a lunatic raised an action of cognition and sale, to have the lands of the lunatic sold. On considering the circumstances, the Court granted authority to sell, which the curator immediately carried into effect by selling the lands; he then became bankrupt, and never accounted for the price. His cautioners were not called as parties to the action of cognition, but they were aware of the proceedings. On a demand being made against them for the price, they pleaded that the sale was *ultra vires* of the curator, and that the Court had no power to grant authority to sell; that they were not liable for his intromissions with the price, as this was not an act within the powers of a curator, for which alone they were bound. But, on the contrary, this was an act of extraordinary administration, made in virtue of new powers conferred on the curator posterior to the date of the bond of caution; and the obligation could not be extended to such acts. The Court, however, held that the cautioners were liable. It was observed, that although the Court may have been wrong in interposing their authority to the sale, it was the party who applied for this authority, and his cautioners, who are responsible for the consequences. Whatever was done, was *periculo petentis;* and if the cautioners

had disapproved of the proceedings, they ought to have stepped forward to prevent them, or at least have applied to the Court, and might in this way have got rid of their obligation (*a*). In consequence of this decision, it is now the practice to order intimation to the cautioner of all applications to the Court for extraordinary powers (*b*).

Where property is situated in a foreign country.

The cautioners are liable for the tutor's or factor's intromissions with funds wherever situated, if he intromits with them in his tutorial or factorial capacity; and this notwithstanding that he may require to use the name of the pupil or his mother in recovering funds in a foreign country. The act in such a case is held to be that of the guardian, not of the mother (*c*).

Cautioner is not liable for administration after tutory has expired.

The cautioner is, however, only liable for the transactions of the curator, tutor, or factor, during his administration; and therefore, if, after the period of the guardianship or factorial management is expired, the guardian shall intromit with the estate, the cautioner is not liable therefor, inasmuch as it was not done in the due performance of the office according to the bond (*d*). A cautioner for a tutor-at-law was found liable for debts due by the tutor himself to his pupils, payable in his own lifetime, but not for those which only became payable at his death (*e*). Penal interest incurred by a factor under the Pupils' Protection Act is chargeable against cautioners only down to the date of the factor's removal from office (*f*).

Septennial limitation, and delay in calling principal to account.

II. The septennial limitation, introduced by the statute 1695, c. 5, does not apply to cautioners of the kind here treated of. It applies merely to cautioners 'in any bond or contract for sums of money;' and, accordingly, the cautionary obligation of a guardian being for the discharge of an office, subsists, notwithstanding the expiry of seven years from its date (*g*). In one case the cautioner endeavoured to get rid of his liability by pleading the delay in calling the *curator bonis* to account after his office had expired. At

(*a*) *Eaton* v. *Murdoch*, 9 June 1826, 4 S. 688, F. C.; aff. 4 July 1828, 3 W. S. 246.

(*b*) *Supra*, p. 497 (*c*).

(*c*) *Ferguson* v. *Menzies*, 21 May 1830, 8 S. 782.

(*d*) *Morland* v. *Sprot*, 19 Feb. 1831, 9 S. 478; *Ritchie* or *Lambe* v. *Ritchie*, 14 Dec. 1837, 16 S. 219.

(*e*) *Bogles* v. *Bogle* (1794), M. 2107.

(*f*) *Maxwell's Trs.* v. *Jeffs*, 25 June 1862, 24 D. 1181.

(*g*) *Kerr* v. *Bremner*, *supra*, p. 399 (*c*).

the time of the expiry of the office, the curator was solvent, when a balance was due by him. Four years thereafter he became bankrupt, and his cautioner was called upon to make up the deficiency. He pleaded that he was freed by the delay in calling the curator to account when he was solvent; but the Court repelled this plea, on the ground that he himself could have obtained the matter closed, by insisting on an application to the Court for a discharge of the principal at the proper time; and not having done so, he was liable for the balance due at the expiry of the office (*a*).

Whether the cautioner freed by the laches of the minor or his friends.

The rule is now settled, that with regard to the cautioners for trustees under sequestrations, bank agents, and other factors, the party standing in the situation of creditor, or having the direct interest to see that the duties of the trustee or factor are duly performed, is bound to protect the cautioner by a reasonable degree of superintendence of the conduct of the principal; and if he has failed in doing so, he loses his recourse against the cautioner. The principle of this rule is, that the caution is intended not to supersede, but as a security additional to, the superintendence of the creditor himself,—the party directly interested in seeing that the management is correct (*b*).

This rule, applicable to ordinary cases of factorial management, has no reference whatever to the cautioners of tutors, or factors *loco tutoris* of minors. With regard to the party principally interested, there is a total incapability of exercising any control whatever over the principal; and there is this further distinction, that his property was put under charge of the tutor or factor, not merely without any act of his own will, but expressly because he was incapable of looking after it himself. Thus, therefore, the creditor is in a situation which altogether excludes the idea of laches, and the relations, or next of kin of the minor, cannot interfere from want of title. The party in fault must be the party in right of the debt, and *personalis exceptio* arising from the laches

(*a*) *Morland* v. *Sprot*, 4 Dec. 1829, 8 S. 181.

(*b*) 1 Bell's Com. 360 *seq.*; *Mein* v. *Hardie*, 19 Jan. 1830, 8 S. 346; *Pringle* v. *Tait*, 10 July 1834, 12 S. 918; *Duncan* v. *Porterfield*, 13 Dec. 1826, 2 S. 89; *Smith* v. *Campbell*, 24 June 1829, 4 S. 1070; *Forbes* v. *Welsh*, 10 June 1829; *Thistle Society* v. *Garden*, 17 June 1834, 12 S. 745; *Magistrates of Glasgow* v. *Hopkirk*, 16 Nov. 1839; *Leith Bank* v. *Bell*, 12 May 1830, aff. 1 Oct. 1831, 5 W. S. 703.

cannot be pleaded on the act of a third party (the relations), for whose proceedings the creditor in the debt is not responsible (*a*). In one case it was held that the presumptive heir of one under curatory having made an illegal agreement with the *curator bonis* to the prejudice of the cautioner, the cautioner was freed as in a question with that heir (*b*). The cautioners for factors and others under the Pupils' Protection Act are entitled to appear and be heard before the accountant in the course of the audit, and to state objections to the accountant's report; the expense of the discussion being borne by the cautioner and not by the estate, and such objections forming no ground for delaying consignation of any balance ordered by the accountant, or otherwise giving immediate effect to the audit (*c*).

Caution transmits against heirs.

III. Where a party undertakes a cautionary obligation, that obligation does not die with him, although he does not in express terms bind his heirs, executors, and successors. The obligation continues the ancestor's; and it is as representing him that his heirs are liable on the bond of caution, and come into the situation of obligants. The principle is not that the heirs adopt the obligation, and so render it their own proper and personal debt; it is because they intermeddle with the succession of the obligant that they come in his place as debtor in his liabilities,—such liability, however, always being only as for an obligation of the ancestor, of whom the party is alleged to be the representative (*d*).

Cautioner may withdraw.

A cautioner for a tutor or his heir may, however, withdraw from the obligation, upon giving due intimation of his intention; and in the case of cautioners for a judicial factor, such as a factor *loco tutoris* or *curator bonis*, the cautioners must make application to the Court, so as to afford an opportunity for obtaining new caution in their stead (*e*). 'Cautioners,' says Mr Bell, 'having once engaged for an officer's fidelity, cannot suddenly withdraw from that responsibility, to the effect of throwing the affairs entrusted to the officer into confusion. But they may withdraw by giving notice of their resolution so to do, after a considerable time allowed for a

(*a*) *Kerr* v. *Bremner*, *supra*.

(*b*) *Lawson* v. *Coldstream*, 17 May 1837, 15 S. 930.

(*c*) 11 and 12 Vict. c. 51, ss. 15, 16.

(*d*) *Kerr* v. *Bremner*, *supra*.

(*e*) See the form, 3 Bell's Styles 378.

new arrangement' (*a*). When a cautioner dies, or becomes bankrupt, the Court will, at the instance of any having interest, ordain the tutor to find a new cautioner; and failing his doing so, they will remove him (*b*). By the Pupils' Protection Act it is provided, that 'on the death or insolvency of the cautioner of any factor, such factor shall forthwith give notice in writing to the accountant of such death or insolvency; and the accountant shall, as soon as the fact shall come to his knowledge, by means of such notice or otherwise, require new caution to be found' (*c*).

Liabilities of the cautioner for a minor.

IV. Though a minor be restored *in integrum* against a deed to his lesion, the obligation still subsists with regard to a cautioner, unless the contract be such that it could have been reduced by him had he been the principal contractor. The reason of this is, that he is presumed to interpose for the creditor's security, *inter alia*, against the hazard of a reduction on minority and lesion (*d*). The minor also, though he reduce the deed, cannot be sued in any action of relief at the cautioner's instance against him, otherwise the reduction would be elusory (*e*). If it can be shown that the bond was not granted to protect against a reduction on minority, the cautioner will have the benefit of the *restitutio*. Thus, if a minor as heir of his predecessor grant any deed or bond, and thereafter is restored against his having taken up the succession, and such deed in consequence fall, the cautioner will have the benefit of the restitution, because it is not granted from any wrong in the particular deed, but on account of a prejudice sustained in taking up the succession at all (*f*). Where there was any fraud on the part of the creditor, whether in the business which was the subject of the obligation, or in the manner of engaging the cautioner, the obligation of the surety would not be enforced. Thus, if one who lends money to a minor induce another to become cautioner by false allegations of his being of age, the obligation of the cautioner will be voided (*g*).

(*a*) 1 Bell's Com. 366; *dicta* in *Kerr* v. *Bremner*, *supra*; More's Notes, p. xliii.

(*b*) *A.* v. *B.*, M. 16286 (1672); *Stirling* v. *Tutors of Govan*, M. 16286 (1672); *Welsh* v. *Welsh*, M. 16373 (1778). More's notes, *ibid.* See *supra*, p. 313 (*h*).

(*c*) 11 and 12 Vict. c. 51, s. 11.

(*d*) Code ii. 24, 1; Bankt. i. 7, 97; More's Notes, p. cx. *Ewing* v. *Malloch*, 20 Feb. 1681, 3 Sup. 398; *Kinghorn* v. *Cleland*, M. 2075 (1672).

(*e*) Bankt. i. 7, 97.

(*f*) Dig. xxix. 2, 89; Dig. xxvi. 7, 1; Bankt. i. 7, 97.

(*g*) Code ii. 24, 2; and other texts to the same effect are cited in Van Leuwen's notes to this title.

And so the minor having suspended a charge on the ground of minority and lesion, of an account for furnishings, and having subsequently, on attaining majority, granted bond of corroboration in respect of which he was decerned against, the cautioner in the suspension was freed, 'seeing the principal was overtaken by his own deed of ratification subsequent to the suspension, which could not prejudge the cautioner, who was *in bona fide* to engage for him' (*a*).

(*a*) *M'Dougal* v. *Maxwell* (1706), M. 2148.

PART SEVENTH.

GUARDIANSHIP OF INSANE AND FACILE PERSONS.

CHAPTER I.

LUNATICS OR IDIOTS.

SECTION I.

GUARDIANS OF PERSONS INSANE AT COMMON LAW.

THE sovereign, as *Pater Patriæ*, was, by the early law of Scotland, recognised as the natural and legal guardian of the insane (*a*). From Craig (*b*) it may be deduced, that in ancient times the feudal lord was entitled to the guardianship of all his idiot or fatuous vassals; and that the sovereign had a like right to the curatory of the furious, seeing that he alone had the right to employ chains to coerce his refractory wards. *Quia furiosi vinculis sunt coercendi* (*c*).

Nearest agnate entitled to office of tutor.

The right which the sovereign thus possessed, Balfour says, was never exercised until the party had been cognosced by an inquest; and the power of guardianship was always delegated by the Crown to tutors and curators, some of them kinsmen on the father's side, and some on the mother's, who were to be men of judgment, discretion, and lawful age, sufficient for the rule and administration

(*a*) Craig ii. 20, 9; Balfour, p. 254, c. 19.

(*b*) Craig ii. 18, 29, and ii. 20, 9.

(*c*) Craig ii. 20, 9. See Riddell, Peer. and Cons. Law, p. 38; Ridd. Tracts, pp. 194–5.

committed to them (*a*). As the Roman law gradually acquired a footing in Scotland, the rule of that system, whereby the nearest agnate was in all cases of this sort entitled to the office of guardian, soon operated a change upon the practice; and, accordingly, long before the appearance of authentic statute law to regulate the matter, we find the superior dropt out, and the nearest agnate substituted in his room as legal guardian of all fatuous or idiots (*b*). Thereafter, in the year 1585, a statute was passed which reduced the practice to one uniform rule, and sanctioned in every case the rule of the Roman law, viz. that the nearest male agnate of lawful age is entitled to the guardianship of an insane relation, in whatever form the insanity may be evinced (1585, c. 18).

Where a person, in anticipation of insanity, appoints a tutor to himself.

I. There is no express authority for saying that a man can, in anticipation of his own insanity, appoint a guardian to himself. The question as to the insanity existing, might be raised between the fatuous or his friends, and the tutor. Supposing the insanity established, would such an appointment exclude the nearest agnate as tutor-at-law, or a tutor-dative, or a *curator bonis* appointed by the Court? A case somewhat of this nature occurred where a person in health addressed a letter to two friends, requesting them to take the charge of himself and his affairs, in the event of his incapacity supervening. Incapacity having come on, the two friends applied to be appointed curators or tutors, in terms of his letter to them. The Court considered it a question of importance, and requiring consideration; Lords Gillies, Balgray, and Craigie intimating an inclination to sustain the appointment as permanent, and preferable to all others, on the ground that the analogy of a trust disposition here strongly applied, and that a man is entitled, in anticipation of threatened illness or incapacity, to select such of his friends as he has confidence in, to have the custody of his person, and to manage his affairs; but in the meantime the Court merely granted authority to the petitioners, to take the interim management with the usual powers (*c*).

Fathers and tutors (*d*) testamentar.

II. A father (*d*), as has been already shown, is administrator-

(*a*) Balfour, p. 122, c. 7.

(*b*) Craig ii. 20, 9.

(*c*) *Howden and Todrick* v. *Sibbald*, 9 March 1833, 11 S. 561. The point was debated in a prior case, *Paterson* v. *Pollock*, 10 Dec. 1811, F. C.

(*d*) In some treatises the guardians of the insane are spoken of as *curators*, though they are in the most proper sense tutors. They are given *personæ* —to wards who are incapable of consent like pupils; and they are appointed

in-law for his children till their majority (*a*). Should they become insane, and continue in this state after majority, he has the right, founded in nature itself, to their guardianship prior to all others (*b*). After majority, however, the child must be cognosced, to entitle the father to act as his tutor (*c*). The question hence arises, if he can delegate this power to another after his death, in the same manner as he is held entitled to nominate tutors to his pupil, and curators to his minor, children. Both Stair and M'Kenzie (*d*) impliedly give it as their opinion that the father has no such power, seeing that, in treating of his powers in this matter, they only mention that the Act of Parliament allowing the nearest agnate to be served does not 'exclude the father from leaving tutors in his testament, to such idiots and furious persons as are *within the years of tutory* as he may do to other children.' Erskine, again (*e*), while he admits that no instance has occurred in our practice, of testamentary tutors or curators being given to insane children above majority, maintains that where any natural incapacity appears in a child, the father is as justly entitled to name a tutor to him while he continues under that disability, as he is to appoint one for protecting him against the follies of youth; and this was the Roman law (*f*). In support of this doctrine, reference may be made to the general opinion of lawyers, that 'the state of an infant and an idiot is equipollent in law' (*g*). These appear to be the direct authorities in favour of the father's right of nomination. But Professor Bell thus states a case without giving names or dates: 'Duke of A. The doctrine of Erskine as to a father's power to appoint curators for his insane son after majority was doubted' (*h*); and in his Principles he holds that there is no power to name testamentary tutors to an insane

upon brieves in the same form as tutors-at-law to pupils are. The mistake arose from copying the somewhat loose language in this instance of the Roman lawyers, who employ the term curator (Inst. i. 23, 3). The use of the term has, however, been condemned by the highest Scotch legal authorities, as tending to unnecessary confusion, and the term *tutor* was used in the statute itself, 1585, c. 18. See Craig ii. 20, 9; Bankt. iii. 47; Ersk. i. 7, 50 *in med.*

(*a*) *Supra*, p. 346.

(*b*) Ersk. i. 7, 50.

(*c*) *Infra*, p. 534.

(*d*) Stair i. 6, 25; M'Kenzie, Obs. on Statute 1585, c. 18.

(*e*) Ersk. i. 7, 49.

(*f*) Inst. i. 23, 1; Dig. xxvi. 3, 1, 3; Dig. xxvi. 3, 2, 1; Dig. xxvii. 10, 16, par. 1; Code v. 70, 7 *in fin.*

(*g*) Bankt. iv. 45, 11.

(*h*) 3 Bell's Illus. p. 48.

person, to continue after his majority (*a*). The case referred to by Mr Bell appears to have been that relative to the Duke of Atholl, to whom curators were appointed by his father; and who sisted themselves as parties to an action, on which 'the Court, being of opinion that a father had no power to nominate curators to his son, of full age, although insane, superseded the cause till a curator-dative should be appointed' (*b*). In a previous case, where the Court superseded tutors so appointed, there being a difference between the two survivors as to the assumption of new tutors, the Lord President 'expressed considerable doubts whether a father could nominate guardians to act after the ward had attained majority, except in regard to a provision made by himself' (*c*).

Even if the opinion of Erskine be correct, it would be essential, before the father's nomination can take effect, that his child be cognosced insane, because no one can be deprived of liberty, or the power to manage his own affairs, who has arrived at majority, unless he be validly declared incapable of properly exercising these rights (*d*).

Father's powers as tutor.

In the management of his insane child's affairs, a father has no higher or greater power than an ordinary tutor-at-law, and could not, for example, make a will for his child (*e*).

Tutors-at-law.

III. The mode of procedure in the appointment of a tutor-at-law to one insane has remained unaltered for some centuries, and formed part of our ancient consuetudinary law (*f*). It is very absurd, very cumbrous, and very expensive (*g*).

Who may take out the brieve.

Any party having an interest may purchase from the Chancery a brieve, directed to the judge ordinary within whose jurisdiction the insane person resides. Properly it should be directed to the judge ordinary where he usually resides. But if he be resident at the time in another jurisdiction, as Edinburgh, where some important witnesses also reside, and where it is easier to obtain the attendance of counsel learned in the law, the brieve may, on appli-

(*a*) Bell's Prin. 2109. See also arg. in *Colquhoun* v. *Wardrop*, Mor. 6277; Spottiswoode's Report (1628).

(*b*) *Duke of Atholl's Curators*, 17 May 1831, 3 Jur. 419.

(*c*) *Crawford* v. *Ballantyne*, 11 March 1828, 6 S. 749.

(*d*) Ersk. i. 7, 49.

(*e*) *Morton* v. *Young*, 11 Feb. 1813, F. C.

(*f*) Craig i. 12, 29.

(*g*) See the whole forms in the appendix to the case of *Yoolow*, reported by Mr Colquhoun.

cation by bill addressed to the Lords of Council and Session, be directed to the judge ordinary of that jurisdiction, and a special commission will be granted to him to hold the inquest (*a*). The brieve ordains the Sheriff to summon an inquest (consisting of fifteen persons, whose verdict is by a majority) for cognoscing the party (*b*). From the days of Balfour downwards, there never was any need of a proper pursuer in this case; the inquisition being for a public object, and taken on the king's precept, who probably in early times issued the brieve, without any application for it having been made,—a circumstance rendered all the more probable, from the difference in its terms as contrasted with the brieve of mortancestry, which always bears to be obtained *latore præsentium*, while nothing of this sort is to be found in the brieves of idiotry and furiosity. But notwithstanding this, the proceeding is not of the nature of a popular action, so that, in the language of Lord Monboddo, 'any man for fourteenpence could purchase a brieve of idiotry against any man' (*c*). There must be an interest of some sort, and relationship is considered by our law sufficient. The privilege is not confined to the nearest agnate capable of being tutor; it is competent to any of the next of kin. It matters not that the person found to be nearest agnate, of lawful age, will not proceed to complete the proceeding, by taking out a nomination following on the verdict, as tutor-of-law. If he refuses, there is room made immediately for an application to Exchequer for a tutor-dative (*d*). This doctrine has been sanctioned by several decisions. In one, a pupil, brother *consanguinean* to the fatuous, and who, as being a pupil, could not be tutor, purchased a brieve with consent of one of his own guardians (the rest not concurring), to have his brother cognosced; and the title of this guardian and pupil was sustained, though neither of them could be tutor to the fatuous (*e*). In another case, a person had been an incurable idiot from his infancy. The father had a considerable estate. He had also a daughter; but instead of leaving his property to his daughter, burdened with a suitable annuity to the son, he disponed the estate

(*a*) See the forms in the appendix to the case of *Lockhart*.

(*b*) Craig i. 12, 29, and other authorities as follows in this section.

(*c*) 5 Sup. 745.

(*d*) *Per* Lord Gillies in *Bryce* v. *Graham*, 25 Jan. 1828, F. C., and 6 S. 425.

(*e*) *Stark* v. *Stark*, Mor. 6291, 5 Sup. 745 (1746).

to the son, under the condition, that if he should be cognosced, then the property should go to the daughter. On the marriage of this lady, she and her husband proceeded with the necessary steps to obtain the son cognosced. The cognition was opposed by the nearest male agnate, who maintained that the sister being a female, had no title to purchase the brieve, since she could not be tutor. The Sheriff found 'that the claimants being nearest of kin, have a legal title to prosecute the brieve.' The case was advocated, when Lord Braxfield, before whom it was tried, 'repelled the reasons of advocation;' and to this judgment the Court adhered (*a*).

Though the principle of these cases was doubted lately by some of the judges, yet the ultimate decision of the Court confirms it, and sets this question at rest. They find 'that such brieve can be obtained only by the voluntary application of the *relatives* of the party,' and that there is no process known in the law by which a cognition by brieve and inquest can be obtained, when not sued out by *relatives* (*b*). If the relations decline to move in the matter, the Lord Advocate has no right or authority to do so (*c*).

The proceeding by cognition, therefore, is not merely a step to the service of the nearest agnate as *tutor-at-law*. It may be adopted by any of the friends as a means of obtaining a tutory-dative, or the appointment of a *curator bonis;* in which case the verdict is limited to the party's state of mind, without answering any of the points of the brieve applicable to the nearest agnate (*d*).

Referring to the explanation already given of the procedure in the analogous case of a brieve of tutory relative to pupils (*e*), it will be necessary here only to state the particulars in which the procedure in this case differs (*f*).

(*a*) *Somerville and Husband* v. *Paterson*, 10 March and 7 June 1798, stated in Lord President's speech in *Bryce* v. *Graham*, 25 Jan. 1828, and in note to reports of that case. The nearest agnate entered an appeal to the House of Lords, but withdrew it before it was heard.

(*b*) *Bryce* v. *Graham*, *supra*.

(*c*) *Per* Lord Gillies in *Bryce* v. *Graham*, *ibid.*

(*d*) Bell's Prin. 2109. See also case of *Yoolow*, reported by Mr Colquhoun, advocate, in a separate volume, p. 4, and *infra*, p. 533; *M'Alister*, petr., 1 Dec. 1836, 9 Jur. 102.

(*e*) *Supra*, p. 186 *seq.*

(*f*) See the whole proceedings stated in Bell's Styles, vol. iii. p. 338, with the forms of the writs; 1 Jurid. Styles, p. 426; 4th edition, pp. 309 *seq.* and 322; Frazer's Judicial Proceedings, p. 275; introduction to the report of the case of *Yoolow*.

In the first place, the judge to whom the brieves of idiotry and furiosity ought to be directed is the judge ordinary of the bounds where the lunatic resides, and not, as in the case of other brieves, any judge ordinary throughout the country (*a*). Secondly, The brieve must not only be published, but it is required also that it be served on the fatuous or furious person (*b*). The object of these two alterations on the ordinary practice is this, that every facility might be afforded to the party alleged to be insane, to oppose the brieve if he saw it for his interest, and in order that his state of mind might be tested by an assize of his own neighbours, who could judge from their knowledge of his past life as well as from the evidence of witnesses laid before them (*c*).

To whom is the brieve directed.

Service of the brieve.

There are two brieves regarding this matter, which have been in existence from a very early time, and which were intended to include all kinds of insanity. These are the brieves of furiosity and idiotry. The common practice, which has received the sanction of the Court (*d*), is to purchase both brieves, to make up a claim applicable to each, and to retour that brieve under which the jury find the character of the party's insanity can be brought. The brieve of furiosity inquires, '*Si sit incompos mentis, prodigus et furiosus, viz. qui nec tempus, nec modum impensarum habet, sed bona delaceranda profundit?*' The brieve of idiotry, again, inquires, '*Si sit incompos mentis, fatuus, et naturaliter idiota, sic quod timetur de alienatione tam terrarum suarum quam aliarum rerum mobilium et immobilium?*'

Nature of the brieves of furiosity and idiotry.

A jury is empannelled to try the points of the brieve; and though by the treaty of Union it is enacted, relative to peers, that they shall be tried by their peers, yet as insanity is a misfortune, not a crime, and as the design of the cognition is not for punishment of the person insane, but for his advantage, this privilege has no place here (*e*).

Proceedings of the inquest at the trial.

The first duty of the inquest after being sworn is to ascertain

(*a*) Craig i. 12, 29; Bell's Styles, p. 340, vol. iii.; Ersk. i. 7, 49; 1 Jur. Styles 426, 4th edition, p. 308. See *supra*, p. 526, as to commission granted on special cause to the judge ordinary of a jurisdiction before whom it is more convenient to try the case.

(*b*) Authorities, *ibid.*

(*c*) Ersk. i. 7, 49; M'Kenzie's Obs. on Statute 1585, c. 18.

(*d*) *Stark* v. *Stark*, Mor. 6291, 5 Sup. 745 (1746). See *Dewar* v. *Dewar and Reid*, 25 Feb. 1809, F. C.

(*e*) *Falconer*, 4 Sup. 769 (1709).

the state of mind of the person alleged to be insane. For this purpose, the best evidence that can be procured must be adduced. It consists chiefly of the depositions of persons acquainted with the party, and of medical men who have been cited to give their opinion. The inquest themselves may be witnesses by our law, as appears from the statute itself (*a*). It has been settled by a judgment of the House of Lords, that in a proof of insanity it is not competent to adduce evidence as to the insanity of the relations of the person alleged to be insane (*b*). The evidence may be taken by commission (*c*).

Party must be produced to the jury.

In order to enable the inquest properly to arrive at a conclusion relative to the party's state, the law has been careful in insisting that they should personally see the insane person, either in open court, or by adjournment to meet with him more privately, and thus judge from ocular inspection of his condition (*d*). A verdict of cognition has been reduced, principally because the person found insane was not presented to the inquest, who were thus held to have proceeded on insufficient grounds (*e*). And rather than that the inquest should lose the benefit of forming a judgment after a personal conference, the Sheriff has been authorized to hold the inquest in the person's house when he was unable to come to Court (*f*). Or the jury, as in the case of *Yoolow*, will proceed to the lunatic's house, and after seeing him return to the Court. But though this is considered of so much importance where it can be performed, yet when the party said to be insane cannot be produced to the jury, as by detention in a foreign country, sickness, or causes of the same nature, the inquest may proceed to cognosce without seeing him; and their verdict would not be set aside, merely because the *fatuus* was not produced. There have been unreported cases to this effect (*g*). Indeed, the rule requiring the party to be produced to the jury has been (*h*) explained to be not so stringent as

(*a*) Statute 1475, c. 67; M'Kenzie's Obs. thereon, p. 83.

(*b*) *M'Adam* or *Walker* v. *M'Adam*, M. App. Proof 3, 1 Dow 177 (1806).

(*c*) 1 Jurid. Styles, p. 428, 4th edition, p. 316.

(*d*) Ersk. i. 7, 51; Wallace, p. 396; *Inglis* v. *Inglis*, 4 Sup. 517, and 5 Sup. 5 (1701); *Stevenson* v. *Macfarlane*, 20 Nov. 1801, not rep.

(*e*) *Dewar* v. *Dewar and Reid*, 25 Feb. 1809, F. C.; *Stevenson* v. *Macfarlane*, *supra*.

(*f*) *Falconer*, 4 Sup. 742 (1709).

(*g*) Hume's Lec. MSS.

(*h*) Introduction to *Yoolow's* case.

to render the non-production an absolute ground for setting aside the verdict in any case; and more especially it is argued, that where the verdict finds insanity not proved, will the non-production of the party be held immaterial (*a*).

What is insanity?

What amounts to insanity in this matter appears to be a different question from what it would be held to be in any case as to the reduction of a contract, or in a criminal trial. The brieve defines the nature and *indiciæ* of the disease; and the question put to the jury is not whether the person is insane, but whether he is labouring under the particular species of insanity mentioned in the brieve (*b*). Erskine describes the parties who may be cognosced thus: 'Fatuous persons, called also idiots in our law, who are entirely deprived of the faculty of reason, and have an uniform stupidity and inattention in their manner, and childishness in their speech.' 'Furious persons, who may be ranked in the second class, cannot be said to be deprived of judgment, for they are frequently known to reason with acuteness; but an excess of spirits, and an overheated imagination, obstruct the application of their reason to the ordinary purposes of life' (*c*). It is clear that this description does not comprehend one-half of the forms in which the disease may show itself. And yet in the case of *Yoolow* the jury were kept strictly to the description of insanity contained in the brieves, and as explained by Erskine; and as Yoolow could not be said to be 'entirely deprived of the faculty of reason,' nor was 'furious,' the jury would not cognosce him insane. So it was laid down in the late case of *Mr Lockhart* of Camnethan: 'It will not do to rest upon unsoundness of mind, even though it be carried to that point that he cannot take care of himself, or manage his property. It must go further. He must be fatuous.' And 'the legal import of the word fatuous' was declared to be 'a person without mind at all' (*d*). If this be the correct law on this subject, the use of this ancient form for giving protection to the insane will be very much circumscribed; a result, however, from which no practical inconvenience can arise, seeing that the Court of Session can appoint a *curator bonis* even against

(*a*) But see *Dewar* v. *Dewar*, 25 Feb. 1809, F. C., and case stated by Mr Colquhoun at p. 28, Introduction to the Report of *Yoolow*.

(*b*) *Supra*, pp. 529–30.

(*c*) Ersk. i. 7, 48.

(*d*) Sep. Rep. p. 236.

the will of the person alleged to be incapable, and without being limited by the description in the brieves (*a*). And they did so in the very case of Yoolow, to whom, some years after the trial, a *curator bonis* was appointed by the First Division under the presidency of Lord President M'Neill, who was his counsel at the trial before the Sheriff (*b*).

Persons deaf and dumb.

It has been said by a number of our older lawyers, that the Act 1585, c. 18, extends not only to lunatics, but also to persons labouring under such a corporeal infirmity as to incapacitate them for discharging properly the duties of life; and of this kind they hold persons deaf and dumb to be (*c*). There have, in accordance with these opinions, been cases where a person has been cognosced deaf and dumb, and his estate put under the management of a tutor (*d*). But later decisions are entirely against this antiquated doctrine, seeing that persons so afflicted may be as capable of discharging all the duties of life as any one possessed of his entire faculties (*e*). If the defect, however, be of such a nature as to prevent such persons from duly discharging their business, 'curators may be appointed for them as well as for minors' (*f*).

At the trial, on the claim for the party suing out the brieve being proceeded with, proclamation is made for all parties having, or pretending to have, interest to compear and object if they have any cause. The brieve and claim are then remitted to an assize of fifteen persons, 'most worthy, least suspected, and who best know the verity of the matter.' In the case of *Lockhart*, after the jury were sworn and had elected their chancellor, the chancellor took his seat on the bench beside the Sheriff who tried the case. The brieve and claim are then read by the clerk, and the verity of the execution of the brieve proved, not only by the written execution endorsed thereon, but by the oaths of the sheriff-officers and witnesses. A record of the evidence is kept; the evidence of the respective

(*a*) *Bryce* v. *Grahame*, 25 Jan. 1828, aff. 23 July 1828, 3 W. S. 323.

(*b*) 14 D. 1009.

(*c*) Bankt. i. 7, 11; Stair i. 6. 25; M'Kenzie's Obs. on Statute 1585, c. 18.

(*d*) See this stated in *Blair* v. *Blair*, M. 6295 (1748).

(*e*) See inter. of Lord Moncreiff in *Craigie* v. *Gordon*, 17 June 1837, 15 S. 1157; More's footnote to Stair i. 6, 24; and Fraser, Pers. and Dom. Rel. vol. i. p. 48. See *infra*, p. 541 *seq.*

(*f*) Ersk. i. 7, 48 *in fin.*; *infra*, p. 541.

witnesses being taken down by the clerk, read over to each witness after his examination, and signed by him, by the chancellor of the jury, and the Sheriff. A separate minute of the proceedings from day to day is also prepared which states the procedure in Court,—the date and place, the compearance for the parties, the proclamation for all interested to compear, the names of the jurors, the names of the witnesses, the adjournments, the verdict, etc. Where the trial is adjourned, the jury may of consent of parties be allowed to go to their own houses; but they should be cautioned not to hold communication with any one on the subject of the trial. At the conclusion of the trial, and before the jury return their verdict, proclamation should again be made for all other persons having, or pretending to have, interest to compear and object if they have any cause.

Jury must fix when the insanity commenced.

After the jury are satisfied of the insanity of the party, their next duty is to ascertain the period at which it commenced. By the early law, this was a matter with which they could not meddle; their sole duty being limited to the cognition of the parties' state at the date of the trial; and, consequently, every deed executed by the insane person prior to the inquest could only be set aside by proving, in a distinct action, that at the date of its execution he laboured under insanity (*a*). The Legislature, seeing that this practice created a multiplicity of law pleas, passed the Act 1475, c. 66, whereby the inquest were ordained to fix the date at which the insanity commenced; and, accordingly, in the brieves the question is put thus: '*Et quamdiu sustinuit istam fatuitatem*'—'*illam furiositatem?*' It was enacted by the statute, that no alienation of lands, made by him after the time fixed by the inquest as the commencement of the disease, should be valid.

Jury ascertain who is nearest agnate.

The next question put to the inquest is, '*Quis sit tunc propinquior consanguineus ex parte patris?*' Who is the nearest agnate? Prior to the Act 1585, c. 18, it has been already shown that the sovereign and the overlord were held to be the guardians of all afflicted with insanity (*b*); but that statute appointed 'the nearest agnate and kinsman' to be served tutor and curator to natural fools, idiots, and furious persons, 'conform to the common law,' and this in pre-

(*a*) Ersk. i. 7, 59; M'Ken. Obs. on 1475, c. 66.
(*b*) *Supra*, p. 314.

ference to all others. In treating of tutors-at-law to pupils, an explanation was given of the term *agnates* according to the law of Scotland, and the subject will not therefore be resumed (*a*). The nearest agnate in this case is the person who would be appointed tutor-at-law to a pupil (*b*).

Fathers as tutors to insane children.

There is one circumstance, however, which demands special notice here, as it is different from what obtains in regard to pupils. It is the law of Scotland, that the father of a minor is entitled, preferably to all other persons, to the guardianship of his child, under the name of administrator-in-law. Without any service or other judicial proceeding, he is vested with the character. In the case of a brieve of idiotry or furiosity the rule is different. Though the father is entitled to the office of tutor to his insane child, he must claim it under the forms of the Act 1585, c. 18, if the child have arrived at majority; and, therefore, before the father can do one valid act in his capacity of tutor, it is necessary that the child be cognosced insane. It may be presumed, from the analogous case of pupils, that as soon as the insane child is found to be of unsound mind, his father, *eo ipso*, becomes vested in the office, without any nomination or other legal proceeding from Chancery or otherwise (*c*).

Husband tutor to his wife.

The Act 1585, c. 18, only applies where no other legal administrator of the insane person's property otherwise exists (*d*). Such, however, is the case where a wife becomes insane, for her husband is her curator at all times, and her tutor, when cognosced, to the exclusion of the nearest agnate. It was once doubted whether a married woman could be cognosced, because already under curatory; but it is now settled that she may (*e*). There is, however, no absolute necessity for the cognition in such a case, although it will be advantageous, as is illustrated by a decision. A competition of brieves, for the curatory of an insane married woman, arose between her husband and her next of kin. The husband pleaded that by the law of Scotland he was the sole and only curator of his

(*a*) *Supra*, p. 183.

(*b*) *Moncrieff* v. *Maxwell*, M. 6286 (1710).

(*c*) Ersk. i. 7, 49, and 50 *in fin.* See *Halliburton*, *infra*.

(*d*) M'Ken. Obs. on the statute.

(*e*) *Halliburton* v. *Maxwell*, M. 16379, Bell, p. 155 (1791); *Jardine* v. *Currie*, 8 July 1825, 4 S. 158; M'Ken. Obs. on the Statute 1475, c. 66; Ersk. i. 7, 50.

wife; and after marriage there is no room for any other curator whatever. To this it was replied, that a wife is like a minor; and were a husband appointed her curator, he would acquire a power different in its nature, and more extensive than what belongs to him by law in the character of husband. Besides, there was here a contract of separation between the parties before the wife's insanity, and this puts the husband's curatory at an end. The following opinions were delivered:—*Lord Justice-Clerk:* 'The husband is curator, though if he shall abuse his power we will give relief. The contract of separation being *bona gratia*, is revocable at the will of party. Now, when the wife becomes insane, she has no will, so that the contract is at an end.' *President:* 'I am of the same mind on both points. I doubt whether there is any need of a brieve or cognition at all. There is not now any estate to manage; and as to her person, it is already under her husband's guardianship.' *Solicitor-General Blair:* 'There is need of a brieve, because as husband he has not the same coercive power over the wife's person that his tutory to her as insane will give. The brieve, to be sure, must be in the ordinary form; but as the right of curatory is clear, they need only make return on the first head, the fact of fatuity, just as happens where a father cognosces his child.' *Eskgrove:* 'That removes my difficulty, which was only in point of form.' 'The Court went into the Solicitor's doctrine, and preferred the husband' (*a*). In a later case, the question was again raised, but not decided, whether the nearest cognate could take out the brieve (*b*).

A son, as nearest agnate, may be tutor to his father or mother (*c*).

A son tutor to his father.

The next point of the brieve, which inquires as to the careful and provident habits of the person claiming to be tutor, does not require to be proved, as these qualities in him are presumed, and will be so held until the contrary be established (*d*).

Careful habits of claimant for the office.

The jury are then to inquire, *Si sit legitimæ ætatis—Is he of lawful age?* It has formed a question, whether the age of the claimant must be twenty-five, as in tutors of pupils; or if the age

Lawful age of tutor.

(*a*) *Halliburton* v. *Maxwell*, stated in Hume, Sess. Papers, Adv. Lib. vol. 'May—June 1791,' No. 44, with MSS. Notes on Papers, and shortly reported in M. 16379, and Bell's Rep. p. 155 (1791).

(*b*) *Jardine* v. *Currie*, *supra*.

(*c*) See Noodt, Opera, vol. ii. p. 590.

(*d*) See *supra*, p. 187.

of twenty-one—the majority of our law—will be sufficient. The great amount of authority is in favour of the former view (*a*), though this opinion is controverted by other lawyers (*b*).

Where nearest agnate declines the office.

Should the nearest agnate of lawful age not accept the office after the service, the next agnate cannot do so; the only mode of remedying the difficulty being by the appointment of a tutor-dative by the Court of Session acting as the Court of Exchequer, or a *curator bonis* by the Court of Session (*c*). The nearest agnate may serve at any time; and though he may not have served within year and day, he is entitled to supersede any one who has been appointed to the office (*d*).

Verdict of the jury.

When the jury are satisfied on all these points, they, in the case of the brieve of furiosity, serve and cognosce the party to be *incompos mentis*, or of insane mind and furious, viz. that he has neither time nor measure of expending, but that he dissipates and squanders away his effects, and that he has been in this state ever since a date specified; and the other points of the brieve are answered in like manner. These observations apply also to the brieve of idiotry, the verdict on which must of course be framed according to the language of the brieve and the claim of service.

Caution must be found by tutor.

The clerk of Court, in the same manner as in the case of a tutor-at-law to pupils, then obtains caution from the tutor served to the insane person, for the due fulfilment of the duties of his office, and proper administration of the estate. In terms of the Pupils' Protection Act (sec. 26), such bond of caution must, in addition to the usual obligations, contain 'an obligation to observe and perform every duty incumbent on such person in terms of the rules prescribed or to be prescribed for the discharge of his office, in all respects, with a consent to registration for execution.' The service is thereupon retoured to Chancery along with said bond of caution, which the director of Chancery is required forthwith to

(*a*) Stair iv. 3, 9; Ersk. i. 7, 50; Bankt. i. 7, 12.

(*b*) Arg. *Moncrieff* v. *Maxwell*, M. 6286 (1710); Wallace, p. 395; More's Notes, p. xliv.

(*c*) *Supra*, p. 185, and Lord M'Kenzie in *Bryce* v. *Graham*, 25 Jan. 1828; M'Kenzie's Obs. on 1585, c. 18, p. 123.

(*d*) Bankt. i. 7, 9; Ersk. i. 7, 51. *Colquhoun* v. *Wardrop*, Mor. 6276, 1 Sup. 248 (1628); *Stewart* v. *Spreul*, Mor. 6279 (1663); M'Ken. Obs. *ibid.*; *Moncrieff* v. *Maxwell*, M. 6286 (1710); *dicta* in *Bryce* v. *Graham*, 25 Jan. 1828; *Young* v. *Rose*, 11 July 1839, 1 D. 1242.

transmit to the Accountant of Court. Thereafter an extract of the retour is given out and letters of curatory are granted, 'until God in his clemency by death or recovery provide for him' (*a*).

Should the inquest not find a verdict *affirmative* to the points of the brieve and claim, the claimant may purchase another brieve, and try another jury; or he may endeavour to obtain from the Court of Session, as now the Court of Exchequer, a tutory-dative (*b*). Second brieve.

If the claimant fail, it would seem that the Sheriff has no power to find him liable in the expenses to which the alleged lunatic has been put in defending himself (*c*). Expenses.

The claimant in the service may, at the request of the person alleged to be insane, have the oath of calumny put to him,—that he believes the whole points of the brieve (*d*). Oath of calumny.

A service of this kind may be advocated to the Court of Session if it is opposed (*e*), and the service will then proceed before a judge of that Court and a jury. This is now regulated by the Act 1 and 2 Vict. c. 86. Advocation of brieves.

The service of a tutor-at-law to a person insane may be reduced by the Court of Session, on the ground of irregularity and negligence in the proceedings, or on account of the evidence being insufficient to warrant the verdict (*f*). Where such an action is brought, it would appear to be competent for the Court, either to judge of the merits of the case themselves, or to send the matter to be determined by the verdict of another jury (*g*). Reduction of the service.

IV. Should the nearest agnate not accept the office, it has been the practice, from a very early time, for the sovereign, by means of the Court of Exchequer (now the Court of Session), to grant it, under the name of tutory-dative, to any one that may be thought fitted for it (*h*). Erskine treats this form of tutory as being a deviation from our law, and as being granted at the request of those wishing the office, without any cognition of the party's state of Tutors-dative.

(*a*) 1 Jur. Styles, pp. 431–2, 4th ed. p. 314.

(*b*) Bankt. i. 7, 11. See the opinion of Lord Moncreiff in the case of a tutor to a minor, *supra*, p. 188.

(*c*) *Yoolow's* case, p. 116. But see *contra*, *Dewar* v. *Dewar*, 25 Feb. 1809, F. C.

(*d*) See *Dewar* v. *Dewar*, *ibid.*

(*e*) Ersk. i. 7, 49; *Falconer*, 4 Sup. 769 (1709), and authorities following.

(*f*) *Dewar* v. *Dewar*, 25 Feb. 1809, F. C.; *Gray* v. *Gray*, Elch. *v.* Idiotry 1 (1738).

(*g*) *Matthew* v. *Wighton*, 23 Dec. 1843, 6 D. 305. See *Dewar*, *ibid.*

(*h*) Stair i. 6, 25; Craig ii. 20, 9; M'Kenzie's Obs. on 1585, c. 18, p. 122.

mind (*a*). On examining the authorities, however, it will be found that this is the most ancient of all the forms of tutory of the insane known in our law (*b*). From the oldest periods, the sovereign appointed all tutors as '*nostrum substitutum in officio*' (*c*), and great care was taken that proper persons should be named. Long before the Act 1585, which first clearly gave the agnate a right in the matter, we find Balfour writing, that it was only in the event of the verdict of an inquest that the sovereign gave tutors to the insane (*d*). And a case reported by Fountainhall thus begins: 'John Inglis, merchant in Nairn, having fallen melancholy and unfit for business, his friends took a brief of idiotry against him, whereupon he was retoured upon the verdict of fifteen sworn men, to be *rei suæ non satis providus:* and thereon a *tutory-dative* was obtained from the Exchequer' (*e*). This was also the understanding of the older lawyers—of M'Kenzie (*f*), of Bankton (*g*); and M'Kenzie, in his Observations on Act 1475, c. 66, has laid down this doctrine as the law and practice of his time: 'The Exchequer will not grant tutories-dative to the nearest agnats, until their condition be first try'd by an inquest, though the cravers offer to prove the same by witnesses beyond all exception.' Afterwards it appears that the practice was abandoned, and that these gifts were granted *periculo impetrantis* without cognition (*h*). It was this later practice that Erskine seems to have referred to. The right of the sovereign, in short, to appoint tutors-dative, is only the right which he possessed on all occasions to take the guardianship of lunatics, and which was only modified and restrained by the Act 1585, c. 18, giving the nearest agnate a preference to the office in all cases (*i*). On examining the MSS. Records of Exchequer before the Court of Session was made the Court of Exchequer, it has been found that there was no recent instance of the exercise of this royal prerogative,—a

(*a*) Ersk. i. 7, 51.

(*b*) So far back as 1476, we find a man 'admitted be ye Kingis Hienes as lawfull curator-dative' pleading this as the only effectual mode then known. Min. of Parlt. MSS. Adv. Library. Mark 34, 2, 2, p. 12. See also Hadd. MSS. Charters, p. 162, Adv. Lib.

(*c*) Hadd. MSS. Charters, p. 39, Adv. Lib.

(*d*) Balf. pp. 122 and 254.

(*e*) *Inglis* v. *Inglis*, 4 Sup. Mor. 517 (1701); Stair i. 6, 25; *Moncrieff* v. *Maxwell*, Mor. 6286 (1710).

(*f*) M'Kenzie's Inst. i. 7, 14.

(*g*) Bankt. i. 7, 11.

(*h*) *Colquhoun* v. *Wardrop*, *supra*; *Stewart* v. *Spreul*, M. 6279 (1663).

(*i*) See opinions of minority in *Bryce* v. *Graham*, 25 Jan. 1828, Craig ii. 20, 9.

circumstance which may be accounted for by the almost universal resort to *curators bonis* appointed by the Court of Session. On 28th Nov. 1744, the Duke of Bedford and Lord Morison were appointed tutors-dative to Lady Mar, a lunatic (*a*). Alexander Gordon, an idiot, had a tutor-dative appointed to him on 4th Feb. 1755 (*b*); and subsequently a guardian of the same kind was appointed to Janet Stevenson, another idiot (*c*).

Transference of jurisdiction of Exchequer to Court of Session.

By the Court of Exchequer (Scotland) Act, 1856 (*d*), the whole power, authority, and jurisdiction of the Court of Exchequer was transferred to, and vested in, the Court of Session, which was declared to be the Court of Exchequer in Scotland. Provision was made for the appointment of one of the Lords Ordinary as Lord Ordinary in Exchequer causes; and it was declared that, unless where otherwise expressly provided by said Act, all proceedings in Exchequer causes should be brought in the first instance before such Lord Ordinary. It was further provided (*e*), that 'the duties heretofore performed by the Court of Exchequer with regard to the nomination, appointment, or control of tutors-dative, shall be performed by the Court of Session acting as the Court of Exchequer in Scotland upon application for such nomination or appointment to be made to either of the Divisions of the said Court by way of summary petition.' At the time when this statute was passed, all summary applications for the exercise of the *nobile officium* of the Court of Session were in use to be presented to the Inner House; and this is probably the reason why the applications for the appointment of tutors-dative were directed to be so presented rather than to the Lord Ordinary in Exchequer. In the following year, however, the Court of Session (Scotland) Act, 1857 (*f*), was passed, which directed *inter alia* all petitions and applications for the appointment of judicial factors, factors *loco tutoris* or *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, etc., to be presented to the Junior Lord Ordinary; as also all petitions, applications, and reports under the Act of the 12 and 13 Vict. c. 51 (the Pupils' Protection Act).

(*a*) MSS. Records of Exchequer, vol. iv. pp. 368, 372.

(*b*) *Ibid.* vol. v. pp. 352, 353, 355, 371, 460.

(*c*) *Ibid.* vol. v. pp. 280, 287.

(*d*) 19 and 20 Vict. c. 56, ss. 1 and 2.

(*e*) Sec. 19.

(*f*) 20 and 21 Vict. c. 57.

As tutors dative and at law are, except as to the mode of appointment, placed under the provisions of the Pupils' Protection Act, the anomalous result of these various statutes is, that while an application for the appointment of tutors-dative must still be presented in the Inner House acting as the Court of Exchequer (*a*), all incidental applications relating thereto must be presented to the Junior Lord Ordinary, who, as such, has nothing whatever to do with the Court of Exchequer.

Nature of the office of tutory-dative.

A tutor-dative, like a *curator bonis*, is regarded as an interim curator appointed to manage till the tutor-at-law should serve; and accordingly, whenever the latter takes up the office (which he is entitled to do at any time), the nomination of the tutor-dative falls (*b*). But such a tutor has more extensive powers than a *curator bonis*. His appointment annihilates the *persona standi in judicio* of the lunatic, while that of a *curator bonis* (as will afterwards be seen) (*c*) does not; and hence the expediency of obtaining the appointment of such a guardian when the tutor-at-law will not take out a gift of tutory.

Duties and powers of the tutor of a person insane.

V. Before entering upon office, it is necessary that the tutor shall make up an inventory of his ward's estate, as is requisite with regard to tutors and curators of minors (*d*). The powers of the tutor are the same as those of a tutor to a pupil; and the obligations to count and reckon, and properly and effectually to discharge the duties of the office, with all the penalties for enforcing them, which have been already stated as applicable to tutors of pupils, also hold in relation to the tutors of the insane (*e*).

Person.

(1.) As to the custody of the person of the insane, Lord President Hope observed: 'When the tutor-at-law comes forward, he is not entitled to take charge of the person of the *fatuus*; he is thereby incapacitated from this charge. That duty belongs to the nearest cognate, if he is a proper person to have such a charge. I do not state

(*a*) *Wilson*, 22 Jan. 1857, 19 D. 286; *Martin*, 26 Nov. 1859, 22 D. 45; *Urquhart*, 2 March 1860, 22 D. 932; *Simpson*, 16 July 1861, 23 D. 1292.

(*b*) Stair i. 6, 25; Ersk. i. 7, 51. *Moncrieff* v. *Maxwell*, M. 6286 (1710); *Spreul* v. *Stewart*, M. 6279 (1663); *Colquhoun* v. *Wardrop*, M. 6276, 1 Sup. 248 (1628); *dicta* in *Bryce* v. *Graham*, 25 Jan. 1828; *Young* v. *Rose*, 11 July 1839, 1 D. 1242.

(*c*) *Infra*, pp. 543–4.

(*d*) Act 1672, c. 2; Stair i. 6, 25; Balf. p. 123; *supra*, p. 200 *seq.*

(*e*) Stair i. 6, 25; Ersk. i. 7, 52.

this on my own authority, but on the authority of a case which was very deliberately considered, and which puzzled the Court very much' (*a*). This is contrary to the former rule (*b*). But although this be the rule applicable in general to the tutor-at-law, founded upon the same principle as that which debars a tutor of the same kind from demanding the custody of a pupil, yet it must be taken with the limitations already detailed as to tutors-at-law of pupils (*c*); and in one case the tutor, the heir-at-law, was preferred to the custody over the lunatic's sister, as there was no heritage, and consequently the tutor was not debarred by being heir in that kind of property (*d*). When the tutor-at-law is thus excluded from the custody of the person, the Court will appoint a party with whom the insane person may be placed; and this in general will be the nearest cognate (*e*).

All other tutors are entitled to the custody of the person. Their powers, however, must be exercised with sound discretion; and if they be guilty of any act which may be improper or prejudicial to their ward, such as removing him out of the country, the Court will interfere, just as they do with regard to pupils (*f*). With regard to the allowance to be made for aliment, the law will be found stated elsewhere (*g*).

Estate.

(2.) As already mentioned, the tutor of a person insane has the same powers over the estate as the tutor of a pupil (*h*); and with this general statement, a reference will here be made to the law already stated relative to the tutors of pupils.

How the office terminates.

VI. The office of tutor to a person insane terminates in various ways. 1. In testamentary nominations where the conditions of appointment fail; and of this the rules have been already stated in considering the law relating to pupils (*i*). 2. By the death of either the tutor or the person insane. 3. By the return to health of the latter; but in this case the convalescence must be ascertained by the decree of the Court of Session, in an action of declarator

(*a*) *Bryce* v. *Graham*, 25 Jan. 1828.
(*b*) Balf. p. 123.
(*c*) *Supra*, p. 219 *seq.*
(*d*) *Blair* v. *Blair*, 19 May 1814, not reported; Hume, Sess. Pap. Summer 1814, No. 20.
(*e*) *Supra*, p. 219.
(*f*) *Supra*, p. 219.
(*g*) *Infra*, p. 546. *Gordon* v. *Gunn*, 30 June 1832; *Myers*, 19 June 1845, 17 Jur. 464.
(*h*) Ersk. i. 7, 52.
(*i*) *Supra*, p. 309 *et seq.*

of convalescence brought before them (*a*). The tutor is not entitled to resign office merely because there is a lucid interval; it is necessary that the disease be radically cured (*b*). 4. By the removal of the tutor as suspect. 5. By the marriage of a female tutor-dative. 6. By the supervening incapacity of the tutor. 7. By the existence of a condition on which the subsistence of the office depended. For the authorities sanctioning these rules, reference is made to what has been already said in regard to the termination of the tutory of pupils (*c*). 8. By the service of any one as tutor-at-law, the appointment of tutor-dative to the lunatic ends (*d*). 9. By the tutor's bankruptcy (*e*). 10. By resignation on cause shown to the satisfaction of the Court (*f*).

Declarator of convalescence.

The mode of procedure where a party thinks that he has recovered his health, is to raise an action of declarator of convalescence, containing a reduction of the retour and tutory (*g*). If the tutor agrees to resign, after a complete cure, the person cognosced may resume the administration without any process, taking care to preserve evidence of sanity in any important transaction (*h*). 'There is,' said Lord President Hope, 'this strange anomaly in the law of cognition, that when a person has been regularly cognosced, —when the question of reconvalescence comes before us, that is not to be determined by a jury, but by a declarator of reconvalescence' (*i*). In this case the Court held, 'that even in the case of a party found to be insane or fatuous by brieve and inquest, but on whose behalf it is asserted that he has reconvalesced, that fact, if denied by the tutor, is not by the law of Scotland made the subject of another inquiry by brieve and inquest, but by action of declarator of convalescence, in which the pursuer must bring proof to the satisfaction of the Court *pro ut de jure*.' In declaring the convalescence of a party, the Court formerly insisted upon seeing

(*a*) 3 Jur. Styles, p. 238.

(*b*) Stair i. 6, 25; Ersk. i. 7, 52.

(*c*) *Supra*, p. 220.

(*d*) *Young* v. *Rose*, 11 July 1839, and other authorities, *supra*, p. 540 (*b*).

(*e*) *Dixon*, 20 Jan. 1832. See *Johnston*, 11 July 1822; *Fraser*, 18 Dec. 1828; *M'Pherson* v. *A. B.*, 19 Dec. 1840.

(*f*) 12 and 13 Vict. c. 51, s. 31.

(*g*) Balf. p. 124; 3 Bell's Styles, p. 351; 3 Jurid. Styles, p. 238; *Ederline's Tutor-at-Law*, Elch. *v.* Tutor and Curator, No. 12 (1740); *Inglis* v. *his Tutor*, 4 Sup. 517, and 5 Sup. 5 (1701). See Dallas, Part iii. p. 31.

(*h*) Bell's Prin. s. 2111. But see Ersk. i. 7, 52.

(*i*) *Bryce* v. *Graham*, 25 Jan. 1828.

him, and would not judge upon the report of a commission (*a*), but this practice seems now to be abandoned (*b*). After a decree of convalescence has been pronounced, the Court cannot, though the person should relapse into insanity, authorize the tutor to resume the management without a new verdict (*c*).

SECTION II.

CURATORS BONIS TO THE INSANE APPOINTED BY THE COURT OF SESSION.

Should no person apply for the office of guardian to the insane in any of the forms just explained, it is competent to make an application to the Court of Session to have some person nominated by them *curator bonis* (*d*). The Court of Session have exercised this power for upwards of a century; and in a late case their jurisdiction in the matter was, after full argument, sustained here and in the House of Lords. The judges, while they admitted that the process by cognition is the proper and regular mode of appointing a guardian or administrator to persons labouring under insanity or fatuity, held that it was an integral part of the jurisdiction of the Court of Session, as the Supreme Court, to prevent the waste and dilapidation of property caused by the absence, incapacity, or other infirmity of the true owner; and this they did until a regular tutor took up the office, by appointing a temporary manager without the formality of cognition, and even against the wish of the *persona incapax*. This jurisdiction was justified on the ground that the Court had no power to order a cognition, which they thought could only originate in the voluntary act of the relations of the party. And though the appointment is made, without limiting the time during which the guardianship is to continue, still there is no

(*a*) 4 Sup. 517, and 5 Sup. 5.

(*b*) *Gordon* v. *Gunn*, 30 June 1832, and 22 Dec. 1832; *Bryce* v. *Graham*, *ut sup.*

(*c*) *Ederline's Tutor*, Elch. *v.* Tutor and Curator, No. 12 (1740).

(*d*) The whole of the forms of the applications for the appointment of these officers, the certificates by which they must be accompanied, and the form of recalling the factory or discharging the cautioner, will be found in the Appendix; also in Bell's Styles, vol. iii. p. 354 *seq.*

inconvenience in this, as the tutor-at-law may serve, and so put an end to the appointment; and when it is unlimited, it saves the expense of repeated renewals (*a*). This decision is in direct contradiction to a prior unreported case, not founded on in the pleadings, where it was held that if the application for a *curator bonis* were opposed by the person alleged to be insane, the appointment would not be made (*b*). Although the appointment by the Court may thus proceed without cognition, yet the fact that a party has been cognosced will not bar them from nominating a *curator bonis*, if the tutor-at-law do not take up the office (*c*).

Professor Bell lays it down, that a *curator bonis* may be appointed to an individual not labouring under such an amount of mental incapacity as would warrant his being cognosced by an inquest as insane. This doctrine has been sanctioned by the Court, who have appointed curators to parties who, from old age and infirmity, or from being deaf, dumb, and blind, or otherwise diseased, were incapable of managing properly their own affairs, though they were intelligent otherwise (*d*). Such an appointment was made where the party (Yoolow) denied the statements as to his incapacity, but admitted that he had corporeal infirmities which prevented his exercising any active superintendence over his affairs (*e*); also in a case where it was reported, that 'while the lady possessed a sort of readiness, and even occasional shrewdness, of conversation upon ordinary affairs, she was nevertheless of weak mind, and that, if left to herself, she would be very apt to be misled both with regard to her own conduct and the management of her affairs' (*f*). The interest of others in the property has been held not to be a good ground for the appointment of a curator, there not

(*a*) *Bryce* v. *Graham*, 25 Jan. 1828, aff. 23 July 1828, 3 W. S. 323. In this case Lord Eldon stated, that he thought it a 'very considerable liberty' to appoint a *curator bonis* to an insane person.

(*b*) *Jerdon* v. *Scott*, 2 March 1784. Arniston Coll. Sess. Pap. Adv. Lib. vol. clxxv. No. 26.

(*c*) *M'Alister*, petr., 1 Dec. 1836, 9 Jur. 102.

(*d*) Ersk. i. 7, 48 *in fin.* *Howie*, 6 Dec. 1826, 5 S. 72; *Dewar* v. *Dewar*, 21 Jan. 1834, 12 S. 315; *Netherbyres*, 5 March 1777, N. R.; *Jardine*, 14 Jan. 1784, N. R.; *Watson*, 15 Feb. 1793, N. R.; *Gordon*, Feb. 1805, N. R.; *Swindle*, 6 March 1805, N. R.; *Black*, 7 March 1805, N. R.; *Sinclair*, 29 June 1839, 14 F. C. 1058, note; *Mark*, 14 June 1845, 17 Jur. 450; *Simpson* v. *Gardiner's Trs.*, 30 Sept. 1833, 11 S. 1049.

(*e*) *Allan* v. *Yoolow*, 15 July 1852, 14 D. 1009.

(*f*) *Speirs*, 4 July 1851, 14 D. 11.

being such mental incapacity as to cause danger to the person's own interests (*a*). The Court refused to make the appointment in the case of a person incapable from disease of managing his own affairs (*b*). It was refused, also, where it appeared that an old man, though he laboured under a hallucination, had it considerably under control, and his affairs were very simple, while restraint was apt to aggravate his disease and make confinement unavoidable (*c*). In a case where there were strong allegations of the necessity of the Court interfering on account of the party being nearly deaf and dumb, and incapable of granting a discharge, the Court, acting on a report from medical men, refused to appoint a curator; the Lord President stating, that while 'it is very important that persons who are labouring under physical defects that disable them from managing their own affairs, should have the protection of the Court; on the other hand, it is equally important that the Court should not give effect to every objection founded upon the physical defects of parties, and not take upon themselves to supersede them in the management of their affairs, without being satisfied of the necessity for interference' (*d*). The Court, too, have appointed a *curator bonis* to a person in a state of mental incapacity although he was under trust; and although it was alleged that the trust embraced every interest and property, which otherwise would have fallen under the management of the *curator bonis* (*e*). The necessity for such an appointment arises from this, that notwithstanding the existence of the trustees, the law presumes the party sane, and he may act as such until he is put under guardianship (*f*).

Who entitled to the office.

The rules already stated as to factors *loco tutoris* are entirely applicable to *curators bonis* of lunatics, and some of the decisions there cited were pronounced in cases of applications for a *curator bonis* to persons insane. These rules have been laid down generally, and all the authorities as to the appointments of factors and curators have been there brought together (*g*). The tutor-at-law may

(*a*) *Forsyth*, 19 July 1862, 24 D. 1435.

(*b*) *Cameron*, 20 Nov. 1849, 12 D. 912.

(*c*) *Henderson*, 9 July 1851, 14 D. 12. See also *Forsyth*, *supra*.

(*d*) *Kirkpatrick*, 8 June 1853, 15 D. 735.

(*e*) *Dalrymple* v. *Ranken*, 25 June 1836, 14 S. 1011; *Robertson* v. *Lamb*, 11 March 1829, 7 S. 573; *Lindsay* v. *Watson*, 14 June 1843, 5 D. 1194.

(*f*) *Lindsay*, *ibid.*

(*g*) *Supra*, p. 460.

be appointed curator (*a*); and if there be a competition and undue keenness shown to obtain it, a neutral person, suggested by the clerk of Court (*b*) or the Sheriff (*c*), will be preferred. The Court refused to appoint as *curator bonis* the husband of a sister with whom the lunatic resided, as it would place the lunatic too much under their control (*d*). On the same principle they refused to appoint one of the office-bearers of the asylum in which the lunatic was confined (*e*). And the same rule was applied in another case (*f*), where the Lord Justice-Clerk (Hope) thus explained the reason for it: 'I have no doubt the party named is a very fit person to entrust with the office; but it is a bad precedent to appoint a party in his position. In many cases the result would be to make the income of the lunatic a part of the means of the party with whom she is boarded.' And Lord Cowan observed: 'The party with whom the lunatic boards is not the proper party to decide what part of her income is to be spent on her maintenance.'

Mode of appointment.

One of the insane person's next of kin (*g*) presents a summary petition to the Court, stating the condition of mind of the person who is wished to be put under curatory, and suggesting some one for the office (*h*). The propriety of the next of kin, entitled to pursue a process of cognition, applying to the Court for the appointment of a *curator bonis* was in one case doubted by the Lord

(*a*) *Jackson* v. *Wight*, 19 June 1835. A brother also was so appointed in these cases: *Henderson*, 2 July 1801, M. 14982; *Graham*, 23 Jan. 1851, 13 D. 951; *Allan*, 12 Feb. 1852, 14 D. 486. See *Cameron*, 20 Nov. 1849, 12 D. 912. The Court refused to appoint the brother, because he was entitled to serve as tutor-at-law. See also *Armitt*, 25 May 1844, 6 D. 1088.

(*b*) *Stewart*, 12 Feb. 1830, 8 S. 512.

(*c*) *Monteith* or *Grierson*, 30 June 1840, 2 D. 1234. See *infra*, p. 548.

(*d*) *Walker* v. *Fergusson*, 16 Nov. 1849, 12 D. 912.

(*e*) *Gatherer*, 17 July 1852, 14 D. 1046, and 1 Stu. 971.

(*f*) *Montgomery*, 7 March 1855, 17 D. 623.

(*g*) In the following cases the petition was at the instance of relatives: *Anderson* (1748), M. 7439—wife and children; *Stark* (1746), M. 6291; *Henderson* (1801), M. 14982; *Monteith* or *Grierson*, 30 June 1840, 2 D. 1234; *Graham*, 23 June 1851, 13 D. 951—brother; *Allan*, 12 Feb. 1852, 14 D. 486—brother and sisters; *Connon*, 20 June 1848, 10 D. 1366—brother and sisters-in-law; *Wright*, 28 Nov. 1849, 12 D. 911—sister-in-law, being mother of lunatic's next of kin; *Dewar*, 21 June 1834, 12 S. 315; *Lockhart*, 17 July 1857, 19 D. 1075—nearest male agnate; and by the nearest of kin in *Speirs*, 4 July 1851, 14 D. 11; *Smith*, 24 Jan. 1852, Jur.; *Allan*, 16 July 1852, 14 D. 1009, and 1 Stu. 1085.

(*h*) See the form in App., also 3 Bell's Styles 354, and *supra*, p. 464.

Justice-Clerk Hope; but the rest of the Court, in refusing the application, proceeded upon other grounds (*a*). The lunatic may himself present such a petition (*b*). Where there are no relations (*c*), or where the relations refuse to interfere (*d*), the petition may be at the instance of other parties, such as the person in whose house the lunatic was residing at the time of the attack, or of his law-agent. Where the relatives refuse to interfere, the petitioner must qualify an interest to make the application. The heritors of a parish, being desirous of making permanent arrangements for conducting the parish school, and there being no one legally entitled to arrange on the part of the schoolmaster, whose father refused to apply for a *curator bonis*, were found entitled to apply (*e*). Under the Lunacy Act, the Lord Advocate is entitled to make the application in all cases in which he shall be of opinion, either by reason of information furnished to him by the Board of Lunacy or the Accountant of the Court of Session, or by reason of inquiries made by himself or by his order, that such application is expedient and proper (*f*). The petition is ordered to be intimated on the walls and in the minute-book, and to the party himself. If such intimations be not made, and the appointment has taken place, it will be recalled (*g*). The Court now hold, that it is proper in all cases to serve such a petition on the fatuous (*h*). 'We ought never to take the management of a man's property from him without his having full information if it is possible; and therefore in all such cases service must be made on the alleged lunatic himself, along with the usual intimations' (*i*). In one case, where the execution bore that the service copy was left for the lunatic with the superintendent of the asylum, 'because, after repeated applications to Dr Malcolm, physician of the establishment, I was prevented seeing him personally in conse-

(*a*) *Lockhart and Others* v. *Ross*, 17 July 1857, 19 D. 1075.

(*b*) *Swan*, 29 Jan. 1853, 2 Stu. 184.

(*c*) *Macpherson*, 28 Nov. 1850, 13 D. 950; *Bonar*, 18 June 1851, 14 D. 10; *Mason*, 11 March 1852, 14 D. 761, 1 Stu. 294. See also *Hope*, *Oliphant*, *and Mackay*, 13 D. 951.

(*d*) *Ross*, 11 March 1851, 13 D. 950.

(*e*) *Ross*, *ibid.*

(*f*) 20 and 21 Vict. c. 71, s. 81.

(*g*) See *Fowlds* v. *Hodges*, 10 Dec. 1836, 15 S. 244, *supra*, p. 467; *Gordon* v. *Gunn*, 30 June 1832, and 22 Dec. 1832, 11 S. 235.

(*h*) *Gordon* v. *Gunn*, *ibid.*; *Dalrymple* v. *Ranken*, 25 June 1836, 14 S. 1011.

(*i*) *Per* Lord President, after consulting the judges of the Second Division, in *Lang* or *Thomson*, 25 Nov. 1847, 11 D. 148.

quence of the present state of his health,' the Court refused to entertain it as sufficient, the Lord President observing: 'We cannot take that statement as sufficient to warrant us to alter a rule which the Court have adopted from obvious reasons of expediency. No man shall be declared a lunatic by this Court without having an opportunity of knowing personally that an application to that effect has been presented against him' (*a*). The service on the lunatic should be made in presence of the Sheriff or Sheriff-substitute (*b*). The petition must be accompanied by certificates from two medical men, certifying on soul and conscience the condition of the fatuous; and if this certificate be not on soul and conscience, it will not be sustained (*c*). It is not necessary in this country, as was thought by the Lord Chancellor in *Bryce* v. *Graham*, that the certificate of the medical men should be on oath (*d*). The medical certificates must be produced along with the petition, and printed as an appendix to it. Without this, intimation will not be ordered (*e*). The medical certificates ought to bear the date on which the lunatic was last seen (*f*). If the medical certificates produced with the petition are contradicted by others some time—as three months—later in date, certifying the patient to be of sound mind, the Court will not order intimation, but will refuse the petition (*g*).

On the expiry of the days of intimation, the appointment of the person suggested is usually made as a matter of course, if there be no opposition. Where, however, the Court see reason to think the party suggested an improper person to be appointed, a remit has been made to the Sheriff for a report from him, even where there is no opposition (*h*). When the application is opposed, a remit is made to the Sheriff of the county where the party may be residing,

(*a*) *M'Gregor*, 23 Dec. 1848, 11 D. 285. 'The intimating this petition to the lunatic can do him no harm, and I will not believe it to be otherwise on the authority of all the doctors in Europe.'—*Per* Lord Jeffrey, *ibid.*

(*b*) *Scott*, 7 Feb. 1855, 17 D. 362.

(*c*) *Campbell*, 14 Jan. 1830, 8 S. 307.

(*d*) *Per* Lord Gillies in *Bryce* v. *Graham*, 25 Jan. 1828, aff. 23 July 1828, 3 W. S. 323.

(*e*) *Kenmore*, 7 July 1849, 11 D. 1495; *Wright*, 16 Nov. 1849, 12 D. 912; *Robertson*, 2 Dec. 1853, 16 D. 317.

(*f*) *Laidlaw*, 31 Jan. 1846, 8 D. 426; *Lord Advocate*, 20 March 1860, 22 D. 555.

(*g*) *Macfarlane*, 18 Dec. 1846, 9 D. 306.

(*h*) *Thomson*, 8 July 1846, 8 D. 1073; *Walker*, 16 Nov. 1849, 12 D. 912.

to inquire into the grounds of the application, with power to examine medical men and witnesses, and to visit the individual himself, and to state his own opinion. On advising the proof and report, the Lord Ordinary determines whether the appointment should be made or refused (*a*). A person served with such a petition may reclaim to the Court against an interlocutor of the Lord Ordinary making the appointment, pronounced in absence; but he must show cause why he did not appear before the Lord Ordinary (*b*).

Power over the person.

A *curator bonis* of a person insane has no power over his person; his office being entirely confined to the management of the estate. Lord Balgray in one case observed (*c*): 'Another circumstance is, that your interposition is defective, *sua natura*, according to the principles of our law. All you can do is to lay on your hands and protect his *property*. But where is the authority you have over the person? Now when a man is appointed tutor-dative, he is responsible for the safety and comfort of the person. He is not only the manager of his fortune, but he is also manager of his person; but when a *curator bonis* is appointed, and the Court has thus laid its hand upon his property, the individual under curatory retains his status, and he may exercise any right in voting for a member of Parliament or otherwise.' Lord Gillies concurred in these views. In a prior case the point was deliberately considered, and opinions were expressed to the same effect (*d*).

On the ground that the mere appointment of the curator by the Court is not held, like a verdict of a jury, to annihilate the lunatic's status, it has been found incompetent to pursue the factor *loco tutoris* for a lunatic, having funds, for payment of a debt due by the latter without calling him as a principal defender (*e*). It is the

(*a*) *Bryce* v. *Graham*, *supra*; *Gordon* v. *Gunn*, 30 June 1832, and 22 Dec. 1832; *Dewar* v. *Dewar*, 21 Jan. 1834, 12 S. 315; *Grierson*, 30 June 1840, 2 D. 1234; *Taylor*, 12 Nov. 1847, 10 D. 38; *Cochrane* v. *Macaslan*, 21 Nov. 1849, 12 D. 147; *Henderson*, 17 July 1851, 13 D. 11; *Kirkpatrick*, 8 June 1853, 15 D. 734; *J. D. Morrison*, June 1857, unreported. In *Speirs* v. *Crawford*, 4 July 1851, 13 D. 11, and *Forsyth*, 19 July 1862, 24 D. 1435, the remit was to eminent physicians. See also *Lockhart*, 17 July 1857, 19 D. 1075.

(*b*) *Sharp*, 20 Nov. 1860, 23 D. 38.

(*c*) *Bryce* v. *Graham*, *supra*.

(*d*) *Robertson* v. *Elphinstone*, 28 June 1814, F. C., p. 631. *Per* Lord Robertson and Lord Justice-Clerk.

(*e*) *Govan* v. *Thomson*, 20 Dec. 1814, F. C. But see *Mackenzie*, 21 Jan. 1845, Jur.

curator bonis who fixes the allowance for the lunatic's aliment; and if it be not sufficient, the proper course is to apply to the Court for an increase. In one case they remitted to the Sheriff, on such an application being presented to them, to fix the allowance (*a*). With regard to the amount, the first object to be attended to, is to enable a lunatic to live, in as much comfort as his annual income will allow. It will not be permitted that he should be maintained on a fractional part of his income, while the rest of it is accumulated for his relations (*b*).

Power over the estate.

The *curator bonis* of a lunatic has the same powers of management of the estate of his ward as the factor *loco tutoris* of a pupil, or in general the judicial factors of the Court of Session; and as this subject has been fully considered in treating of the powers of factors *loco tutoris*, where all the decisions as to curators of lunatics were cited, it will be unnecessary to resume the subject here (*c*).

How the office terminates.

When the fatuus thinks himself recovered, there is here no necessity for raising an action of declarator of convalescence. It is sufficient to present a petition to the Court, praying for the recall of the curatory; and if this petition be opposed, the Court take the same means for arriving at a knowledge of his state of mind, by remit to the Sheriff, as they do when the application for the *appointment* of the curator is opposed (*d*). In one case the remit was to eminent physicians; and the Court recalled the curatory on report by them, that though the petitioner still retained the delusion under which she laboured when the curator was appointed, yet in their opinion she was quite capable of managing her affairs, the only danger being that, as the delusion involved a serious charge against her daughters, it might influence her in any testament she might make (*e*). A medical certificate of sanity, in an application for recall of curatory, ought not to bear date from an asylum. 'The fact that the certificate is dated from a lunatic asylum ought not to

(*a*) *Gordon* v. *Gunn*, 30 June 1832, 10 S. 742.

(*b*) *Myers*, 19 June 1845, Jur.

(*c*) See, as to the usual powers, *supra*, p. 473 *seq.* And as to the extraordinary powers granted by the Legislature or the Court, see *supra*, p. 490 *seq.*

(*d*) *Gordon* v. *Gunn*, 30 June 1832, and 22 Dec. 1832, 11 S. 235; *Bryce* v. *Graham*, *supra*; *Forster*, 23 Dec. 1848, 11 D. 1031; *Davie*, 20 July 1849, 11 D. 1495; *Lockhart*, 24 June 1862, 24 D. 1086; *Forsyth*, 19 July 1862, 24 D. 1435; *Lawson*, 19 Dec. 1863, 2 Macph. 355.

(*e*) *Forsyth*, *supra*.

stand on the records of Court' (*a*). The office comes to a close by the service of the tutor-at-law (*b*). The death of the curator does not take the estate of the ward out of the hands of the Court. Even though an application for recall of the curatory be pending at the time, the Court will *ante omnia* appoint a new curator on the ground that the estate must be in the hands of a proper officer (*c*). A petition and complaint by a lunatic against a curator will not be sustained, nor will the Court appoint a curator *ad litem* to the lunatic in that petition. The proper course is to present a petition for an *interim* curator for this purpose (*d*).

A petition by a curator for discharge on account of leaving the country, and for appointment of a new curator, is incompetent in the Inner House, and must be presented to the Junior Lord Ordinary (*e*). Petitions for recall of the curatory on the ground of convalescence are still competent in the Inner House (*f*).

SECTION III.

POWERS OF THE INSANE.

Till a party is cognosced (or a *curator bonis* appointed), the law presumes sanity, and he may sue and be sued till his defect is legally established (*g*). After cognition by *an inquest*, his *persona standi in judicio* is at an end (*h*). The verdict being declaratory, all deeds or acts of every kind, whether relating to moveables or heritage, which may infer any obligation against the person insane, or prejudice or hurt his interest, executed by him at any time after the period from which the inquest find his insanity to have commenced, are null, and may be set aside by exception, without any

(*a*) *Simpson*, 11 Jan. 1860, 22 D. 350.

(*b*) *Supra*, p. 541.

(*c*) So fixed in *Forster*, 17 Nov. 1859, 22 D. 15. In a previous case the Court refused without fresh medical certificates of insanity to appoint a new curator.—*Beveridge*, 6 Dec. 1849, 12 D. 912.

(*d*) *Mackenzie*, 21 Jan. 1845, 7 D. 283.

(*e*) 20 and 21 Vict. c. 56, s. 4; *Kyle*, 10 June 1862, 24 D. 1083.

(*f*) *Lockhart*, 24 D. 1086, and other cases just cited.

(*g*) *Lindsay* v. *Watson*, 14 June 1843, 5 D. 1194.

(*h*) But not so if a *curator bonis* merely be appointed without a verdict. *Supra*, p. 549.

other proof of insanity than the production of the verdict, even although the party dealing with him (which is contrary to the English law) (*a*) knew not of the verdict, and believed him sane (*b*). In the management of his affairs, and indeed in relation to society, he is considered as a pupil incapable of transacting any of the business of life. '*Societatis humanæ jura ei non competunt*' (*c*). And there is no ground in law for the argument which was maintained in one case, that the deeds, which he cannot execute, are merely deeds of alienation of his heritage (*d*). If it be asserted that he has convalesced, or that there has been a lucid interval, the *onus* in this case lies on the party so stating it (*e*): the presumption, it would seem, is, that when a person is cognosced he still remains insane; the presumption being, however, merely *juris*, and not *de jure* (*f*). Professor Bell lays it down, that 'if a lucid interval can be proved at the point of time when a deed was made or a contract entered into, the retrospect of the verdict will not be held to preclude the inquiry in the shape of a reduction and declarator of lucid interval, or as a plea in a reduction of a deed' (*g*). In one case, however, a deed of alienation of land by a cognosced idiot was brought under reduction. It was granted within the time during which he was found to be an idiot. The Court held that the production of the verdict of the jury was a sufficient ground for reducing the deed; and that it could not be founded on at all, till the verdict of the jury were set aside (*h*).

Deeds may be reduced on insanity though there be no cognition.

But, further, deeds which have been executed by a party while labouring under alienation of mind may be reduced (although he never was cognosced), upon his condition at the time being clearly established; and in one case, the deed sought to be reduced had been executed thirty years prior to the action (*i*); and such an action of reduction (which is the competent form of proceeding) (*k*)

(*a*) 3 Bell's Illustrations 46.

(*b*) Craig i. 12, 29, and ii. 18, 29; Act 1475, c. 67; Bankt. i. 7, 10; Ersk. i. 7, 50; *Moncrieff* v. *Maxwell*, Mor. 6288, Fount. second report (1710).

(*c*) Craig ii. 18, 28.

(*d*) *Lindsay* v. *Trent*, Mor. 6280 (1683); *Maxwell* v. *Bonar*, Mor. 6288 (1704).

(*e*) M'Ken. Obs. *ibid.*

(*f*) Bell's Prin. 2110; 1 Bell's Com. 137.

(*g*) Bell's Prin. 2111.

(*h*) *Cunningham and Craig his Curator* v. *Barr*, 4 March 1791, Hume Sess. Papers, Adv. Lib. 'Feb.—March 1791, No. 92.

(*i*) *Lindsay* v. *Trent*, *supra*.

(*k*) *Crawford* v. *A. B.*, Mor. 6275 (1583), and other authorities following.

may be raised at the instance of the fatuous himself, or of his heir after his death, or of any other party having interest (*a*). On the ground that a man, though not cognosced, was an idiot from birth, a marriage by a woman with him was annulled, notwithstanding that the parties had cohabited for months, and that a child was born from the connection (*b*). A verdict showing lucid interval on a particular day is not conclusive to bar reduction on the ground of insanity of a deed made on that day (*c*). But transactions entered into while the party laboured under no defect of judgment, and which have not been completed prior to his insanity, will not, in consequence of that supervening disease, fall. And accordingly it has been held no reason for recalling a sequestration that the debtor had become insane after having granted a mandate to conduct his business, under which the debt on which the sequestration was awarded was contracted (*d*). In all proceedings relative to the *fatuus*, it is the tutor who appears and acts for him. It is he who must sue and be sued, grant charters, etc. (*e*).

Privileges of the insane.

There is a very close and just analogy between the case of a person cognosced insane and a pupil (*f*); and it has therefore been thought by most lawyers, that they are entitled to all the privileges of minors, not absolutely peculiar to the latter (*g*). 1. It is thought that they are entitled to the privilege of *restitutio in integrum* against deeds done to their leison while under tutory (*h*). 2. They are also entitled to the privilege of *intus habet* in a question of accounting between them and their tutor (*i*).

(*a*) *Alexander* v. *Kinnier*, Mor. 6278 (1632); *Loch* v. *Dick*, Mor. 6278 (1635); *Christie* v. *Gib*, Mor. 6283 (1700); *Tulloch* v. *Arbuthnot*, Mor. 11672 (1759); *Murman* v. *French*, 2 Sup. 168 (1673); *Gillespie* v. *Gillespie*, 11 Feb. 1817, F. C.; *Watson* v. *Noble's Trs.*, 18 Nov. 1825, aff. 29 June 1827, 2 W. S. 648; *M'Diarmid* v. *M'Diarmid*, 17 May 1826, 4 S. 583, H. L. 28 March 1828, 3 W. S. 37; Bankt. i. 7, 10; Ersk. i. 7, 51.

(*b*) *Blair* v. *Blair*, Mor. 6293 (1748).

(*c*) *Currie* v. *Jardine*, 23 June 1827, 5 S. 838; *Hay* v. *Keill*, July 1810, in 1 Bell's Com. note 1, p. 137. See also *Towart* v. *Sellers*, 16 May 1817, 5 Dow 231.

(*d*) *Pollock* v. *Paterson*, 10 Dec. 1811, F. C., and Buchanan's Rep. p. 220.

(*e*) See the difference as to a *curator bonis*, *supra*, p. 549.

(*f*) Craig i. 14, 3; Wal. p. 401.

(*g*) *Dict.* of Fountainhall, 4 Sup. 770.

(*h*) Bankt. i. 7, 106; Ersk. i. 7, 52; Wallace, p. 401.

(*i*) *Supra*, p. 320.

CHAPTER II.

INTERDICTION.

IDIOCY and madness are the extremes of incapacity, between which and sanity of mind there lie a number of cases, for which the law has provided protection. One who cannot be treated either as an idiot or a madman, may yet be very unfit for the discharge of the duties of life. Weak without being fatuous, extravagant without being furious, facile without wanting reason, he may be liable to be imposed on by every sharper, and manage his affairs without judgment or discretion. Silly, or imbecile, or of facility of disposition, are the generic terms for the class in whose favour the law has provided the remedy of interdiction; and the mode in which their defect is exhibited must be in a lavish, or improvident, or careless management of their property.

There are two kinds of interdiction recognised by the Scotch law: 1. Voluntary interdiction; 2. Judicial.

Voluntary interdiction.

Voluntary interdiction is a mode which a person conscious of his imbecility adopts, in order to protect him from the ruin which his weakness would entail upon him. This kind of interdiction was fully admitted only about the beginning of the seventeenth century. In the Roman law it was wholly unknown, it being incompetent for any one to lay himself under the restraint which it imposes, unless he obtained to it the sanction of the Prætor (*a*). It appears that the early practice of Scotland was not conformable to this rule of the Roman law; for although voluntary interdictions do not appear to have been expressly recognised by the Court, yet they had become of frequent occurrence in daily life. This appears plainly from the Act 1581, c. 119, in which the circumstance is

(*a*) Dig. xxvii. 10, 6; Vinnius, lib. i. tit. 23, Com. on, s. 3.

distinctly stated. To check a practice which was so susceptible of being abused, the Court reduced a voluntary interdiction passed *sine causa cognita*, and ordained their decision to be recorded in the Books of Sederunt, that it might be published to the country, and guide the profession in all future time (*a*). In accordance with this case, several other decisions were pronounced, reducing voluntary interdictions which had been executed *sine causa cognita* (*b*).

But these decisions left only a humiliating alternative. No one, however weak, would care about deliberately exposing his infirmity by adducing witnesses to establish his imbecility in a court of law; and the Court, therefore, about the beginning of the seventeenth century, disregarded these precedents, and sanctioned voluntary interdiction. It is now as firmly established as the ancient and more regular judicial form (*c*).

Form of bond of interdiction.

The mode in which the voluntary interdiction is imposed, is by the execution of a deed termed a bond of interdiction. It narrates as shortly as possible the granter's weakness as the cause of granting; declares his confidence in the persons he intends to nominate as interdictors; binds, obliges, and interdicts himself during the whole days of his life to the interdictors, that he will not, without their consent, alienate 'his lands, teinds, heritages, annual-rents, liferents, reversions, tacks, or others; nor grant dispositions, assignations, resignations, renunciations, infeftments of annual-rent, or in security, nor other rights or securities of the same, nor set tacks or rentals thereof; nor grant bonds or any obligations or contracts; nor become cautioner for any person whatever, for payment of sums of money, or performing of acts and deeds' (*d*).

The interdictors, when consisting of a number, may be nominated simply without any qualification, or jointly, or with a quorum, or *sine quibus non* (*e*). The mode in which these various nomi-

(*a*) *Auchenbowie* v. *his Interdictors*, M. 7157 (1607). Prodigus autem, says Craig, nemo reputatur neque feudorum jure, neque nostro nisi sententia precedat, et ut Baldus ait, nisi accusatus et damnatus fuerit: Craig i. 12, 28. See the grounds on which voluntary interdictions were reduced clearly stated in *Campbell* v. *Glenurchie*, M. 7159 (1622), Haddington's report.

(*b*) *A.* v. *B.*, M. 7158 (1618); *Hunter* v. *Hunter*, M. 7161 (1698); *Gordon* v. *Dick*, M. 7161 (1699); *Crawford* v. *Halyburton*, M. 2741, and 2 Sup. 545 (1671).

(*c*) Dallas' Styles, p. 474; Erak. i. 7, 53; Stair i. 6, 37 and 39, and the cases following.

(*d*) 3 Bell on Deeds, p. 404; 2 Jurid. Styles 110, 4th ed. p. 443.

(*e*) Stair iv. 20, 31 *seq.*

nations are made, has been already stated with reference to tutors (*a*).

Cause of granting.

In the narrative, the bond usually narrates the true cause of granting, by explicitly stating the reasons or nature of the weakness under which the granter labours. As this, however, is a confession too humiliating to be willingly made, and not necessary to the object of the deed, the Court will sustain the bond, even although the causes of the granter's imbecility be touched on slightly, or scarcely referred to; and Erskine thinks too, even although the grounds would be insufficient to warrant a judicial interdiction (*b*). In one case, the bond was sustained, where it bore no narrative of facility, 'but only that the granter, for the standing of his family, being very ancient, did oblige himself not to dispone his estate without consent of the persons therein mentioned' (*c*); and in another case he merely stated that, having confidence and trust in certain persons, he was resolved to direct his actions and affairs by their counsel and advice (*d*).

There must be weakness and facility to sustain the deed.

But although the law will not insist on a man making a confession of all his weaknesses, yet it will not allow him to resign his rights as a free citizen, and become subject to the humour and caprice of another without legal grounds. Accordingly, there is no point of law on this subject that has been more frequently adjudged, than that voluntary interdictions, executed without any valid cause for the restraint, will be set aside. The Court have frequently reduced such deeds; and although it may be true that a person is lavish and prodigal in the gratification of his tastes, and so injure himself and his family, yet this must be joined with weakness of mind and facility of disposition, to render an interdiction executed by him valid (*e*).

(*a*) *Supra*, p. 176 *seq.*

(*b*) Ersk. i. 7, 53.

(*c*) *Stewart* v. *Hay*, M. 7132 (1676). See also Bankt. i. 7, 122; Ersk. i. 7, 53; and *Napier* v. *Houston*, 4 Sup. 633 (1706).

(*d*) *Braimer* v. *Innes*, 13 Feb. 1789, stated in 3 Bell's Illus. 59.

(*e*) Stair i. 6, 38 *in fin.*, and 39; Stair iv. 20, 32; Bankt. i. 7, 122; Ersk. i. 7, 53; Bruce, p. 245. *Campbell* v. *Glenurchie*, M. 7158 (1622); *Forbes* v. *Forbes*, M. 5673 (1633); *Stewart* v. *Hay*, M. 7132 (1676); *Gichan* v. *Davidson*, M. 7160 (1623); arg. *Napier* v. *Houston*, 4 Sup. 633 (1706); arg. *Michie* v. *Richardson*, 2 Sup. 85, M. 6147 (1685); *Cranston* v. *Cranston*, M. 7125 (1586); M'Kenzie i. 7, 15; *Wilkie*, M. 7160 (1666); *Hunter* v. *Hunter*, M. 7161 (1698); *Gordon* v. *Dick*, M. 7161 (1699).

Recording bond and execution by a messenger.

The bond is recorded in the Books of Council and Session, and steps are then taken to get it completed by publication to the lieges, and registration in the register of interdictions. This is accomplished by the party presenting to the Lord Ordinary on the Bills a bill narrating the bond of interdiction, and craving letters of publication in common form. On seeing the extract of the bond, the Lord Ordinary will grant warrant for letters of publication, which ordain messengers-at-arms to interdict the party himself personally (*a*) or at his dwelling-place, in terms of the bond, and to publish the same at the market-cross, and inhibit the lieges from dealing with him in so far as he is restrained by the bond. These letters are subscribed by a writer to the signet, and signeted (*b*). They thus form the messenger's warrant for interdicting the party, and inhibiting the public. Publication is made to the lieges by affixing a copy at the market-cross of the head burgh of the sheriffdom or stewartry where the interdicted person resides, it not being necessary to publish also in the sheriffdom where his lands lie (*c*). An execution of these proceedings is then returned by the messenger.

Registration of the interdiction in a public register.

By the ancient practice, this completed the whole proceeding, and the publication to the lieges was thought to be enough to put them on their guard (*d*). This notification, however, was ultimately not considered sufficient; and hence the additional security given, by inserting the bond of interdiction in a public register, patent to all, and from which it can with certainty be learned whether a person is under restraint. There have been various statutes passed to regulate this subject. The forms here observed are the same as those applicable to inhibitions (*e*). By the Act 1581, c. 119, it was ordained that all interdictions, with the executions and indorsations thereof, be, within forty days of the publication of the letters, produced, first to the sheriff-clerk of the shire where the person interdicted dwells and has his residence. And if he have lands in another sheriffdom than where he resides, then the interdiction must be produced to the sheriff-clerk of that shire also within forty

(*a*) It has been decided that this is unnecessary, *infra*, p. 558.

(*b*) See the form, 3 Jur. Styles 544; Dallas' Styles ii. p. 99.

(*c*) Ersk. ii. 11, 4 *seq.*

(*d*) The pernicious result of this practice is stated in detail in the preamble to the Act 1581, c. 119.

(*e*) Ersk. i. 7, 56.

days. And the said letters of interdiction, with their executions, the sheriff-clerks are appointed to insert in their registers. The Act 1600, c. 13, extended the provisions of the above statute, so as to allow the registration also to be made in the books of Council and Session; and thus the necessity of inserting in several local registers is avoided.

The Act 1581, c. 119, in the strongest terms, declares the nullity of all interdictions not duly registered (*a*). To this enactment, however, the Court have recognised several exceptions. Private knowledge on the part of an interdictor has been held sufficient, as against him, to render the interdiction valid without either publication or registration; because, since it was his duty as interdictor to get the interdiction registered without loss of time, he must be *in pessima fide* to avail himself of his own wilful or blameable omission (*b*). Professor Bell extends this further, and lays down the law generally, that private knowledge of the interdiction will be effectual without publication and registration. He refers to a case which does not bear out the doctrine (*c*), and it appears contrary to the distinct declaration of the statute (*d*). Publication at the market-cross without registration does not interpel *bona fide* third parties, and perhaps not *mala fide* acquirers (*e*). It is unnecessary to serve the interdiction on the party himself, whether it be voluntary or judicial (*f*).

Judicial interdiction.

II. Judicial interdiction is the ancient and most regular form of interdiction known in law. Stair calls it 'the genuine way of interdictions' (*g*). It is obtained by the decree of the Supreme Court, and only after proof led of the facility and weakness. This form is not adopted by the *prodigus* himself (*h*); because if he

(*a*) Where the registration is made in one Sheriff Court's books, the interdiction will be effectual against all lands in that county, but not as to lands in other counties. Bayne, p. 34. *Ramsay* v. *M'Lelland*, M. 7131 (1662); Ersk. ii. 11, 6.

(*b*) Ersk. i. 7, 56. *Grierson* v. *Telfer*, M. 7126 and 6298 (1678); *Tenant* v. *Spreul*, M. 7127 (1725); *Graham* v. *Stewart*, M. 7126 (1612). Craig i. 12, 32; Bankt. i. 7, 126.

(*c*) Bell's Prin. 2125. *Tenant, supra.*

(*d*) See also *Cranston* v. *Cranston*, M. 7125 (1586).

(*e*) Stair i. 6, 40; Ersk. i. 7, 56; *Cranston* v. *Cranston*, M. 7125 (1586); 3 Bell's Forms 411.

(*f*) Ersk. i. 7, 56; Stair i. 6, 40. *Seaton* v. *Acheson*, M. 7128 (1622).

(*g*) Stair i. 6, 38.

(*h*) This applies only to the modern practice. In the MSS. Records of the Acts of Sederunt in the Advocates'

wishes the protection which interdiction gives, he has the remedy in his own hands, by executing a bond of interdiction. It is an adverse proceeding adopted by his friends, who resort to this as the only means of affording him protection against his will, when his defects are not of that degree which would justify them in applying for a *curator bonis* on the ground of his insanity, or to have him cognosced as an idiot or a madman.

Who may raise the action?

The interdiction is obtained by an ordinary action in the Supreme Court (*a*). Erskine seems to think that the heir or the next of kin are the only parties who can institute the action (*b*). This, however, does not appear to be correct. In an old case, an interdiction was obtained by one whose daughter had married the son of the person interdicted (*c*); and after the opinions and judgment in the recent case of *Bryce* v. *Graham* (*d*), there seems to be no doubt that any relation may competently institute the action. It would, however, be confined to relatives. This not being a *popularis actio* (as all of this nature were by the Roman law), neither the public nor the Lord Advocate could interfere (*e*).

Summons.

The summons sets forth that the person is 'of weak and facile disposition, easily imposed upon, and liable to do deeds to his lesion and prejudice,' and on that account ought to be interdicted to such persons as the Court shall think proper to name; without whose consent he should have no power of alienating heritage, or 'others pertaining to him,' or from contracting debts (*f*). This summons is served upon the party himself, and decree passes as a matter of course, when it is not opposed. The Court will authorize any persons they think fit to be the interdictors.

Form of process when action opposed.

If appearance be made, the Court proceed to proof, as to the character and disposition of the alleged prodigal, and determine according to the import of that. The interlocutor in one case was in these terms: 'Having advised the information and proofs *hinc*

Library, under date 14 Dec. 1537, there is this entry: 'This day John Jedburgh, of Bonjedburgh, compeirs in presence of the Lords, and desyrs to be interdyted fra ye alienatione of his landis of Creightoun, lyand wtin ye sheriffdome of Haddintoune, without consent of Patrick Hepburne of Waughtone his superior; whilk the Lords grantis and ordains publication to pass thereupon.'

(*a*) Ersk. i. 7, 54.
(*b*) Ersk. i. 7, 54.
(*c*) *Semple* v. *Noble*, M. 7145 (1582).
(*d*) *Supra*, p. 528.
(*e*) See *supra*, p. 528.
(*f*) 3 Jur. Styles 199.

inde, and having called before them the defender, and asked him several questions, the Lords find that the defender is a weak facile man, unfit to manage his affairs; and therefore they hereby interdict him, and discharge him to act in any of his affairs or transactions, without the concurrence of,' etc., 'or any two of them, or the survivor of them, whom the Lords hereby nominate and appoint to be his interdictors, and grant warrant for letters of publication; and ordain the same to be published and registrate in common form, and decern' (*a*).

Publication of decree.

When decree is thus pronounced, the interdiction must be published at the market-cross, and registered in the manner already stated as to voluntary interdictions. It is unnecessary to intimate the interdiction to the *prodigus* (*b*).

Can judicial interdiction be obtained on a brief of furiosity?

It has been said by Bankton, that judicial interdiction may be obtained on a brief of furiosity, and the nearest agnate appointed tutor under it (*c*). But this opinion he does not appear to have had much confidence in, for he asks, 'Was ever a prodigal thus served with us?' to which he answers, 'I know not.' It seems inconsistent with the law; for, although the brieve of furiosity be a verbatim transcript of Ulpian's definition of a *prodigus*, yet the nature of the weakness is treated differently in our law from insanity, which of itself would be a ground of annulling a deed, while facility, without fraud or circumvention, would not be productive of the same result (*d*). Erskine accordingly condemns the law laid down by Bankton (*e*).

Decree does not act retrospectively.

The sentence of the Court imposing the restriction has no retrospective effect, like a verdict of insanity (*f*). It was found in one case, that an interdiction, posterior to the acceptance of a bill of exchange, by the interdicted party, could not be insisted on as a ground of reduction of the bill (*g*).

Who are competent to the office of interdictors.

III. Every one of perfect age and of sane mind may be an interdictor. There are exceptions to this.—A married woman cannot be an interdictor. More especially the law will not allow a wife to be interdictor to her own husband (*h*). Dirleton doubted

(*a*) *Thomson* v. *Thomson*, Mor. App. v. Interdiction 1, and 5 Sup. 488 (1776).
(*b*) Ersk. i. 7, 56.
(*c*) Bankt. i. 7, 118.
(*d*) *Infra*, p. 562.
(*e*) Ersk. i. 7, 54.
(*f*) Ersk. i. 7, 54.
(*g*) *Scott*, 13 May 1837.
(*h*) *Milnton* v. *Milnton*, M. 9452 (1663).

this, but Stewart answered, 'That a husband should be interdicted to his own wife, seems *contra bonos mores*' (*a*). It has also been found that a son cannot be his father's interdictor (*b*). This decision is contrary to the Roman law, and inconsistent with the analogous rule that a son may be curator to his insane father (*c*), and is disapproved of by later lawyers (*d*).

Effect of the interdiction.

IV. There is between interdictors and administrators a wide and essential difference. There is no general trust between the interdictors and the person interdicted. The interdictors have no management of the affairs of the interdicted person. They have no accounts to render of their administration; and their trust, limited in its mode of exercise, is limited also in regard to the subjects over which it extends. All that they are required to do, is to adhibit their consent to the acts and deeds of the *prodigus;* and their duty here is rather of a negative than of a positive character, for they are not obliged to get the *prodigus* to execute necessary or beneficial deeds. He is bound to see to that himself; and after he has brought the deed before them, their duty merely is to say whether or not they will adhibit to it their consent. There is therefore thus a clear difference between the case of the *prodigus* and his interdictors, and a minor and his curators, a mandant and a mandatory, the trustee and the truster, who from the nature of their offices, or from the trust by them respectively undertaken, are bound to perform, or to suggest and get performed, the acts most beneficial for their ward (*e*).

What a *prodigus* cannot do without consent of his interdictors.

Heritage only affected.

(1.) Notwithstanding the broad language of the deed or decree of interdiction, which refers to all property moveable and heritable, it has been long settled that it has no effect whatever as to any property but heritage (*f*).

The decree of restraint imposed upon the *prodigus* has been already seen from the terms of the interdiction. In general, the restraint under which he lies may be stated to be, that he cannot do any deed hurtful to his heritable estate without consent of his

(*a*) Dirl. and Stew. p. 238.

(*b*) *Silvertonhill* v. *his Father*, M. 9451 (1622).

(*c*) *Supra*, p. 535.

(*d*) Bruce, Tutor's Guide, 236; Wal. 402; More's Stair, Notes, p. xxxv. s. 24.

(*e*) Stair iv. 20, 30; Ersk. i. 7, 59 *in fin.*, and Ersk. Prin. i. 7, 35; 1 Bell's Com. 140.

(*f*) Ersk. i. 7, 57, and *infra*, p. 563.

interdictors. Not only direct alienations or deeds imposing burdens on the estate are reducible, but also all deeds of a personal nature, which by means of diligence might be made effectual against the heritage, are so far inoperative. Bonds, bills, or other obligations, therefore, cannot form the ground of adjudication or inhibition (*a*). An original feu (*b*), a tack (*c*), the alienation of a right of reversion, are reducible. In short, all property is considered heritable property as to this question, which by the law of Scotland is considered heritable in contradistinction to moveable in questions between heir and executor (*d*); and whether the deed be in favour of a relation or a stranger, it is equally liable to reduction (*e*).

Deed not null though interdictors do not consent.

The want of consent of the interdictors to a deed executed by the *prodigus* does not render it *ipso jure null*, as is the case with regard to a deed by minors without consent of their curators. If the party had never been interdicted, facility and lesion, without fraud and circumvention, would have formed no sufficient ground of reduction to set aside his deed (*f*). But where he is subjected to this restraint, limited as it is, it is only necessary that he prove lesion, to get reduced any deed executed by him without consent of his interdictors. But lesion must be proved, otherwise the deed will stand as valid as if it had been formally executed with the interdictors' consent (*g*).

What a *prodigus* may perform without interdictors' consent.

(2.) The general rule, that a *prodigus* cannot, without consent of his interdictors, execute any deed whereby his heritage may be affected, is not without exceptions. A *prodigus* is entitled to make a settlement of his estate *mortis causa*, in the same manner as the most unlimited proprietor. Erskine laid down a different doctrine, holding that he can make no settlement of his heritage, nor alter any former settlement of it, though upon the most rational grounds, either with or without his interdictors' consent (*h*). This is the rule applicable to minors, but not as to persons interdicted. In

(*a*) *Arbuthnot* v. *Arbuthnot*, M. 7144 (1724).

(*b*) Craig i. 12, 28, and i. 15, 24.

(*c*) Stair i. 6, 41; *Douglas* v. *Cranston*, M. 7148 (1613).

(*d*) Ersk. i. 7, 57; Wal. p. 409.

(*e*) *Stirling* v. *White*, M. 7127 (1582).

(*f*) *Scott* v. ——, 15 July 1825, 3 Mur. 526; Ersk. i. 7, 55 *in fin.*

(*g*) Bankt. i. 7, 130; St. iv. 20, 30, and i. 6, 41; Ersk. i. 7, 58; *Stewart* v. *Hay*, M. 7132 and 3094 (1676); *Rae* v. *Maxwell*, M. 7150 (1711); *A.* v. *B.*, M. 7149, and 1 Sup. 655, (1672); More's Notes, p. xlv.

(*h*) Ersk. i. 7, 58.

one case it was 'objected, that Thomas's service, as heir of investiture, was an alteration which we also repelled. We thought that the interdiction *per se* was not sufficient to reduce where the interdictors consented, if the granter had such a disposing mind as to be capable to dispone it, if he had had no interdictors; and some thought that a destination of succession would be good without their consent' (*a*). In a later case the Court expressed a deliberate opinion that a person interdicted could, without consent of his interdictors, execute *mortis causa* deeds relative to his heritage (*b*).

Rational and onerous deeds.

Another exception to the general rule is in the case of deeds which are rational and onerous; for wherever it can be shown that a deed is *de in rem verso* of the *prodigus*, it will be sustained. A reasonable provision to the wife of a *prodigus*, granted by him out of his lands, is a rational and onerous deed, which may be executed without the interdictors' consent (*c*). Any obligation which directly may alienate the heritage, or indirectly be the means of carrying it away, through the operation of legal diligence, will be given effect to so far as the money or price has been profitably employed for the *prodigus* (*d*). Accounts of tradesmen who have worked to him (*e*), of merchants and others who have furnished him with clothes and other articles to a moderate and reasonable extent, will be effectual (*f*); and, in short, wherever there exists any antecedent rational cause for the deed, the interdiction will not bar an attachment of heritage (*g*).

Obligations relative to moveable property and person of *prodigus* are valid.

An interdiction has no reference whatever to moveable property, and deeds as to such estate by the *prodigus* alone are unobjectionable in law (*h*). By our early law, however, the interdiction struck

(*a*) *Gray* v. *Smith*, Elch. *v.* Provs. to Heirs, No. 14, 5 Sup. 790, M. 10803 (1751).

(*b*) *Mansfield* v. *Stuart*, 26 June 1841, 3 D. 1103.

(*c*) *Semple* v. *Noble*, M. 7145 (1582). Craig laid down this as the law of his time, and he holds that the provision would be valid, though it were the usufruct of the *prodigus*' entire lands. —Craig i. 12, 32. See also *A.* v. *B.*, M. 7149 (1672), where the Court sustained the plea, that a disposition made by the *prodigus*, without consent of the interdictors, was granted 'for sums of money which were profitably employed for behoof of the disponer.'

(*d*) *Stewart* v. *Hay*, M. 7133 (1676); *A.* v. *B.*, *supra*.

(*e*) *Collington* v. *Faw*, M. 7148 (1624).

(*f*) *Bowman* v. *Kilmarnock*, M. 7149 (1697); *Dingwall* v. *Monro*, M. 7152 (1749); *Rae* v. *Maxwell*, M. 7150 (1711).

(*g*) *Rae* v. *Maxwell*, *ibid.*

(*h*) Stair iv. 20, 33, and iv. 20, 30, and i. 6, 41; Ersk. i. 7, 57.

even against moveables (*a*), and the form of interdiction used in accordance with that old law has been continued down to the present day (*b*). It is competent, therefore, for the *prodigus* to give personal obligations, such as bonds (*c*) and bills (*d*). And such obligations, whether gratuitous or onerous, are effectual so far as his moveables and person are concerned (*e*).

It is competent, upon such personal obligations, to raise and execute all the diligence of the law, with the exception of attaching the heritage. The creditor may arrest and poind the moveables of the *prodigus* (*f*), and may imprison him for non-payment of the debt; and thus the whole system of interdiction may be rendered practically useless: for if the *prodigus* be incarcerated, the Court will not grant him relief, even although his only means of obtaining liberation will be by selling or burdening his lands (*g*). A party under interdiction may be competently convened in an action for payment of an account, without his interdictors being called, provided (if it does not come under one of the exceptions above stated) (*h*) there is no conclusion as to heritage (*i*).

Where the heir of the *prodigus* takes up the heritage on the death of his ancestor, but does not represent him as heir *in mobilibus*, he is not liable upon the personal obligations that would have afforded a good ground for personal execution against the *prodigus*

(*a*) Ersk. i. 7, 57.

(*b*) It is somewhat remarkable, that while the form of Letters of Interdiction used at the present day strikes against moveables, the form given by Dallas does not. Dallas' Styles, p. 474.

(*c*) *Ramsay* v. *M'Lelland*, M. 7131 (1662); *Brown* v. *Lands*, M. 7131, 1 Sup. 221 (1637); *Bruce* v. *Forbes*, M. 7130 (1634); *Crawford* v. *Halyburton*, M. 2741, and 2 Sup. 545 (1671); *Grierson* v. *Telfer*, M. 6298 (1678); *Erskine* v. *Marjoribanks*, 4 Sup. 231 (1694).

(*d*) *Ibid.*; *Scott*, 13 May 1837.

(*e*) Ersk. i. 7, 57; Bankt. i. 7, 131; Stair i. 6, 40. See *Rae* v. *Maxwell*, M. 7150 (1711).

(*f*) Stair i. 6, 41; Ersk. i. 7, 57; Bankt. i. 7, 127. *Brown* v. *Lands*, *supra*; *Bruce* v. *Forbes*, M. 7130 (1634); *Crawford* v. *Halyburton*, *supra*; *Ramsay* v. *M'Lellan*, *supra*; *Erskine* v. *Marjoribanks*, 4 Sup. 231 (1694). In *Arbuthnot* v. *Arbuthnot*, 'the Lords found the interdiction could not extend to moveables, nor to the bygone rents of land, nor to the management or disposal of the said rents during the course of the said interdiction' (Mor. 7144).

(*g*) Stair *ibid.*; Ersk. i. 67, 7. *Broxmouth* v. *Wauchope*, M. 7164 (1610). Bankt. i. 7, 127. *Brown* v. *Lands*, *supra*; *Bruce* v. *Forbes*, *supra*; *Crawford*, *supra*; *Ramsay*, *supra*.

(*h*) *Supra*, p. 562 *seq.*

(*i*) *Marshall* v. *Galloway*, 6 Feb. 1829, 1 Jur. 61.

himself. The reason is, that these obligations were contracted, not on the credit of the heritable estate, in which alone the heir represents the ancestor (*a*). Accounts discharged by the *prodigus* without consent of his interdictors are valid when applicable to moveables. Assignations by him of this kind of property, or deeds concerning the rents of lands, are valid (*b*). Nay, the *prodigus* may grant cautionary obligations (*c*); and it has been found that interdicted liferenters may assign their liferent, seeing the *jus formale* of the liferent is not disponed, but only the *ususfructus* which falls under the party's single escheat (*d*). A *prodigus* interdicted may vote at the election of a member of Parliament (*e*).

What he can do with consent of his interdictors.

(3.) In this case the *prodigus* may execute any deed or act in any way with his property which the most uncontrolled proprietor could. He may, when thus authorized, sell his heritage, or burden it with debt, or feu it. And after heritage is, with consent of the interdictors, converted into moveables, it may be attached just as if it had been moveable at all times (*f*). The consent thus given by the interdictors renders, in the opinion of some lawyers, the deed thus executed absolutely unchallengeable on the ground of lesion; there being here no such privilege competent to a person interdicted as to a minor. The only remedy of the *prodigus* is an action of damages against his interdictors for improperly consenting to such a deed (*g*). The general doctrine, thus stated by Erskine and Bankton, has been adopted by Professor Bell (*h*); but it has been doubted, and in an unreported case the Court allowed a proof of alleged gross lesion in an action to set aside a deed executed by the *prodigus* with consent of his interdictors. A final decision was, however, not pronounced, as the case was taken out of Court (*i*).

(*a*) Stair i. 6, 41; Bayne, p. 34; Bankt. i. 7, 128; Bruce's Tutor's Guide, p. 249.

(*b*) *Arbuthnot* v. *Arbuthnot*, M. 7144 (1724); *Davidson* v. *Town of Edinburgh*, M. 7142 (1684).

(*c*) *Broxmouth* v. *Wauchope*, M. 7164 (1610).

(*d*) *Irvine* v. *M'Brair*, M. 7143 (1685).

(*e*) Wight on Elections, 268; More's Notes, p. xlvi.

(*f*) *Randerson* v. *M'Intosh*, M. 7143 (1685).

(*g*) Ersk. i. 7, 58; Bankt. i. 7, 131. See also Stair iv. 20, 30 *in fin.*

(*h*) 1 Bell's Com. 140.

(*i*) *Brown* v. *Shortt*, 4 Feb. 1807. Hume, Sess. Papers, vol. '1806–7,' vol. ii. No. 64, with the MSS. notes of the opinion of the Court on the Papers, Adv. Lib. From the note of the opinions preserved by Baron Hume, it appears that there was much division in the Court on the point.

Duty of the interdictors.

V. It has been already stated, that the duty of interdictors differs widely from that of tutors and curators. They are not bound to manage the property of the *prodigus*, but merely to consent to, or to withhold their consent from, all deeds which the *prodigus* himself proposes to execute relative to his heritage. In giving such consent, they must do it *qua* interdictors, otherwise the deed will be held as without their concurrence (*a*). Though therefore they should sign as cautioners, this does not imply that they would have done so *qua* interdictors, because in the one case the responsibility merely is, that the estate of the *prodigus* will be sufficient to meet the obligation; and in the other, that the deed itself is rational (*b*). The consent of the interdictors *qua* such is not held to be given by signing witness to the deed (*c*). In the case where the interdictors are jointly named, or with a quorum, or *sine quo non*, the rules as to their acting are the same as those which have been already explained relative to tutors, and which indeed prevail in all such cases of limited and qualified administration (*d*). When the interdictors refuse to interpone their consent to any deed, the remedy, according to the ancient practice, was to ask the Court to sanction the particular act (*e*). It is very improbable that the Court would now undertake such a responsibility. They would, however, in all likelihood, remove the interdictors (*f*).

Diligence prestable by interdictors.

They are not liable for omissions; but they may be subjected in damages if they should improperly give their consent to deeds from which the *prodigus* suffers lesion (*g*).

Interdictor *auctor in rem suam.*

VI. The rule that tutors and curators cannot be *auctores in rem suam* was in one case refused to be applied to interdictors (*h*). This, however, was a doctrine which was strongly condemned by Craig. The rule of law, he says, is general, and applicable to all administrators. *Regula enim in jure est generalis. Nemo sibi jus dicere nemo sui juris auctor esse potest.* 'I know,' he con-

(*a*) Stair i. 6, 41; Bankt. ii. 11, 39.

(*b*) *Forbes* v. *Forbes*, M. 5673 and 7154 (1633).

(*c*) *Taylor* v. *Turnbull*, M. 7156 (1710).

(*d*) *Supra*, p. 176 *seq.*; Bankt. i. 7, 132 *in fin.*; *Hepburn* v. *Hepburn*, M. 7154 (1708); Ersk. i. 7, 55, overruling Stair iv. 20, 31.

(*e*) *Earl of Athole* v. ——, M. 7147 (1607); Bankt. i. 7, 131; Wall. p. 411.

(*f*) *Supra* as to tutors.

(*g*) Ersk. i. 7, 59; Stair i. 6, 37; Bankt. i. 7, 131; Wal. p. 413.

(*h*) *Pringle* v. *Borthwick*, M. 7126 (1621).

tinues, 'that such alienations have been tolerated. Do I say tolerated? Nay, approved of by the Court; but I state what I feel when I declare that this kind of transaction is repugnant to what is honest, to what is good and just, nay inconsistent with law itself' (*a*). By the later decisions, an interdictor cannot be *auctor in rem suam* (*b*). This rule, however, does not prohibit all contracts between the parties, if these be not to the lesion of the *prodigus*. A sale, if onerous and rational,—a loan, the money of which has been beneficially applied for the *prodigus*, or any transaction of a like nature,—may be entered into (*c*); but a lease granted without value, by a liferenter under interdiction, in favour of one of his interdictors, and which was consented to by the other interdictors, was held liable to reduction (*d*).

Termination of the interdiction. Death or failure of interdictors.

VII. With regard to the termination of interdictions, there is a difference between voluntary and judicial. In the latter case, the interdiction cannot be taken away but in the same manner in which it was imposed, viz. by the sentence of the Court. This is not considered requisite in voluntary interdiction. The death of the interdictors, or the failure of a quorum, does not terminate the incapacity of the *prodigus* where he has been judicially interdicted. He cannot proceed immediately to manage his estates as one *sui juris*, but must apply to the Court for other interdictors to enable him to act. There is here an interdiction without an interdictor. In regard to voluntary, again, the interdiction falls by the death of the interdictor (*e*).

Decree of the Court.

Any interdiction may be terminated by a sentence of the Court of Session, which may be pronounced on various grounds,—as that the interdiction was obtained on no adequate grounds of facility existing in the person of the *prodigus* from the beginning; and therefore, however strong may be the language of the deed as to

(*a*) Craig i. 15, 24.

(*b*) *Wardlaw* v. *Wardlaw*, M. 7153 (1607); *Campbell* v. *Campbell*, M. 7156 (1761). Ersk. i. 7, 58. *Grierson* v. *Telfer*, M. 7126 and 6298 (1678); Bankt. i. 7, 131; Dirl. and Stew. 238.

(*c*) *Kyle* v. *Kyle*, 14 Dec. 1826, 5 S. 128.

(*d*) *Fraser* v. *Fraser*, 6 Feb. 1827, 5 S. 301.

(*e*) *Hepburn* v. *Hepburn*, M. 7154 (1708); Ersk. i. 7, 55; Craig i. 15, 24 *in fin.*; Bankt. i. 7, 132; More's Notes, p. xlv.

the party's prodigality, yet the interdiction may, at the suit of the party himself or his creditors, be reduced, upon proof that the narrative is false, and that the person interdicted is provident (*a*), or that since it was obtained he has become *rei suæ providus* (*b*); and in this case the *prodigus* will institute an action of declarator of reconvalescence (*c*). It was in one case found that this action of reduction of the interdiction could not be instituted by a third party having interest to do so, unless with consent of the *prodigus*. The grounds upon which this decision went are not given (*d*). This action is only competent to the Court of Session, and they determine in the matter as in the cognate case of madmen cognosced (*e*). Or the judgment of the Court may proceed on the ground of the incapacity or fraud of the interdictor, in the same manner as against a tutor suspect (*f*), in which case, on application made to them, the Court will decree his removal (*g*).

Consent of interdictors.

Even in voluntary interdiction, the *prodigus* cannot recall it at his own hand, and without the consent of the interdictors. In this case, 'the law,' says Erskine, 'consults his interest against his inclination.' But if the interdictors consent to the termination of the restraint, a voluntary interdiction may be so closed without the authority of the Court, and even though the cause of the interdiction still continues (*h*). But judicial interdiction cannot be taken off except by authority of the same Court which imposed it (*i*), even although both the *prodigus* and the interdictors should concur in bringing the restraint to a close (*k*).

Reduction *ex capite interdictionis*.

VIII. Deeds granted by the party interdicted, after the deed of interdiction has been duly executed and published, may be reduced if to his lesion, and be struck at by the interdiction. The action of reduction is the only mode in which redress can be obtained, it being incompetent to state the objection to the deed by way of

(*a*) Stair i. 6, 39; Bankt. i. 7, 122. *Auchinbowie* v. *his Interdictors*, M. 7157 (1607); *Gichen* v. *Davidson*, M. 7160 (1623); *Wilkie*, 7160 (1666).

(*b*) Ersk. i. 7, 55.

(*c*) 3 Jurid. Styles, p. 179.

(*d*) *Sanderson* v. *Craig*, M. 7165 (1613).

(*e*) *Supra* as to tutors.

(*f*) *Supra*.

(*g*) *Cameron*, 12 Dec. 1810, F. C.

(*h*) See the form of discharge, 2 Jur. Styles 417; Ersk. i. 7, 55; Craig i. 15, 24 *in fin.*; Bankt. i. 7, 132; *Robison* v. *Sibbald*, 16 May 1811, not reported.

(*i*) Ersk. i. 7, 55; Stair i. 6, 43.

(*k*) Stair i. 6, 43, and iv. 20, 32; Ersk. *ibid.* *Sanderson* v. *Craig*, M. 7165 (1613); Bayne's Notes, p. 35.

exception (*a*), except in the case where the party in whose favour it is granted is the interdictor (*b*).

The action may be raised at the instance of the interdictors (*c*), without the consent of the *prodigus* (*d*), and even after his death (*e*); also at the instance of the disponee of the *prodigus* (*f*). By the early law, the *prodigus* himself could not pursue the reduction without consent of the interdictors (*g*). But this is no longer law (*h*). The action of reduction may also be competently intented at the instance of any near relative of the *prodigus* (*i*), or of his heir at-law (*k*), or of creditors whose debts were contracted prior to the interdiction (*l*).

Effect of reduction of interdiction itself.

If the Court reduce an interdiction as having been improperly granted, all deeds done during the time of the interdiction are valid, because the interdiction is reduced *ab initio* (*m*).

(*a*) *Crawford* v. *Haliburton*, M. 2741 (1671); *M'Illvan* v. *M'Rentone*, 1 Sup. 287 (1629). Stair i. 6, 42; Ersk. i. 7, 59; More's Notes, p. xlvi.; 3 Jur. Styles 228.

(*b*) *Wardlaw* v. *Wardlaw*, M. 7153 (1607).

(*c*) *Seaton and Ellies* v. *Acheson*, M. 7128 (1622); *Collington* v. *Faw*, M. 7148 (1624).

(*d*) *Ruthven* v. *Crichton*, M. 7164 (1593); *Broxmouth* v. *Wauchope*, M. 7164 (1610). Stair i. 6, 42.

(*e*) Ersk. i. 7, 59.

(*f*) *Douglas* v. *Cranston*, M. 7148 (1632). Stair i. 6, 41 and 42; Ersk. i. 7, 59.

(*g*) Bayne's Notes, p. 35. *Ure* v. *Michelson*, M. 7164 (1554).

(*h*) Ersk. i. 7, 59. *Graham* v. *Stuart*, M. 7126 (1612).

(*i*) *Tenants* v. *Spreul*, M. 7165 (1725); *Borthwick* v. *Galashiells*, 1 Sup. 90 (1635).

(*k*) *Tenants, supra.* Ersk. i. 7, 59; Stair i. 6, 42; Bankt. i. 7, 129.

(*l*) *Salton* v. *Park*, M. 10420 (1666); Ersk. i. 7, 59; Bankt. i. 7, 129; 1 Bell's Com. 139.

(*m*) Dirl. and Stew. 238–9.

PART EIGHTH.

INTERNATIONAL LAW.

In this chapter the rules of international law on the subject of guardian and ward will be considered. As regards its municipal law, Scotland occupies the position of an independent country, and like all such countries, owes no obedience to any foreign law. But there are many cases arising out of intercourse with other countries which cannot be justly decided without applying foreign law. An independent state may no doubt refuse to apply any foreign law in its courts; but if it does so, it unquestionably isolates itself, to a certain extent, from the community of civilised nations, and cannot expect its legal institutions to be recognised out of its own territory. The disadvantages of such a course are so obvious, that among all nations a *comitas* prevails, according to which, upon suitable occasion, the municipal law of each country retires, and leaves a foreign law to decide. But it is incorrect to derive the principles upon which foreign law is applied in this or any other country from the *comitas gentium*. These principles are comprised in what is known as private international law. *Comitas gentium* is an expression for the motive upon which independent states, each of its own sovereign will, place themselves in subjection to the *jus inter gentes*, and adopt its principles as part of their own laws.

Private international law is applied *ex debito justitiæ*.

Decisions according to these principles, in individual cases, are not, properly speaking, *ex comitate*, but *ex debito justitiæ*. The duty which a court *ex comitate* assumes is that of deciding upon a legal question brought before it, according to the law, whether

home or foreign, which seems most appropriate in the circumstances, in order to do justice between the parties. Strictly speaking, indeed, it may be said there is no such thing as a body of international law distinct from and independent of the municipal law of each country. But it is the fact that each municipal law *proprio vigore* (*a*) regulates its application of foreign law according to general principles; and since these principles are in the main common to all civilised nations, and are adopted *ex comitate* because they are so, there seems to be no impropriety in terming them collectively 'international law.'

International questions as to majority and minority still unsettled in Scotland.

Few points in private international law have given rise to more discussion than those which relate to majority, minority, and the subject of guardianship generally. The different ages which are fixed for majority in different countries, and the want of agreement as to the precise extent of the legal incapacity imposed upon persons *alieni juris*, and as to the power of guardians over the person and property of their wards, have occasioned many questions of difficulty and importance when the ward has passed into foreign countries, has contracted there, or simply there possesses property. In all those continental countries whose laws are based upon the common foundation of the law of Rome, the general similarity of their legal systems has favoured the tolerable unanimity which they seem now at last to have attained. The principles established in such countries are presumably such as accord with the spirit and tendencies of the law of Scotland. It cannot be said, however, that our law has yet attained, in the international relations of guardian and ward, that certainty and fulness which is to be desired.

The theory of *statuta personalia* and *statuta realia* of continental jurists explained.

The continental jurists of the middle ages attempted to settle international questions of minority or majority, and guardian and ward, by the application of the theory of *statuta personalia*, *realia* and *mixta* (*b*), which was ultimately fully elaborated by the jurists belonging to the latter half of the sixteenth century. This theory had its origin in the days of the Holy Roman Empire, when the complete personality, once accorded to all laws, was abandoned, and when Europe acknowledged a certain allegiance to the Pope in

(*a*) See Lord Ardmillan's opinion in *Johnstone* v. *Beattie*, 18 D. p. 358; Lord Stowell in *Dalrymple*, 2 Hagg. Consist. Rep. p. 59; Sir Edward Simpson, *ibid.* p. 407.

(*b*) See, on this subject, Traité des Statuts, by de Chassat, Paris 1845, specially at p. 32; also, Boullenois' Traité des Statuts, Paris 1766, p. 101.

things spiritual, and the Emperor in things secular. The common law of the empire was the Roman and canon law; and the peculiar customs and laws which gradually grew up in the different countries of Europe were regarded as *statuta*,—as exceptional divergences flowing from the autonomy in which these countries were indulged. Certain of these statutes were regarded as personal privileges of the inhabitants of these countries, which were to be conceded to them also in other parts of the empire; and these were distinguished, though there was a want of agreement among jurists touching the precise line of demarcation (*a*), as *statuta personalia*. The laws which regulated minority, interdiction, and guardianship were generally regarded as personal statutes, which, once applied by the *judex domicilii*, fixed the status of a subject of any country in the rest of Europe (*b*). As the principle of independent territorial sovereignty became more firmly fixed, some jurists held that personal statutes had no more effect out of the territory of the nation which established them than real statutes (*c*). The effect of this doctrine was, that a man's legal capacity not being fixed as a personal quality by the law of his country, was a purely local matter, varying in every country other than his own into which he might pass. But this doctrine was not generally received, and the former view has in its practical results been adopted and established by long-continued custom among most continental nations.

The different opinions of jurists as to the personal capacities of minors.

This old theory of the statutes is now completely obsolete, but the questions to the solution of which it was applied still remain to be settled in this country, although the method of treatment must be different. To these questions attention will now be more particularly directed. The different opinions entertained by the older jurists are, briefly stated, these:—Most writers maintain that the personal incapacity caused by the minority of the law of the domicile, or the personal capacity of early majority granted by that law, clings to the party throughout the world; that the former prevents

(*a*) Verùm in iis definiendis mirum est quam sudent doctores.—Hertius, De collis. leg. s. 4, No. 3.

(*b*) De Chassat, p. 44.

(*c*) This was the opinion of John Voet, Comm. ad Pand. de Statutis, i. 4, 2, ss. 5, 6, 7; but he admitted the personality of status *ex comitate* as to moveables. Paul Voet, his father, recognised the universality of personal statutes, except as to immoveables: De Statutis, s. 4, c. 2, Nos. 6 and 9. Huber, Prælect. i. 3, ss. 12, 14, to the same effect.

him having in any country, and that the latter enables him to have, powers more extensive than the *lex loci contractus vel actus* allows; and many say that this holds even against the *lex rei sitæ* of real estate (*a*). Some jurists, again, hold that this personal incapacity flies off as soon as the party reaches another country by the law of which he is major, and this even although he has not given up the domicile, the law of which holds him still a minor (*b*). And in like manner, although of the age of majority in his own country, he would be held, according to the same opinion, a minor, if he were not of the age of majority according to the law of the country to which he had wandered (*b*).

Are the capacities of minors to be determined by the *lex loci contractus*, or the *lex domicilii*?

I. The importance of the question as to whether the status of majority or minority is local or purely personal, will be perceived when it is considered that a Prussian, *e.g.*, does not reach majority till the age of twenty-four. If, then, a Prussian at twenty-two years of age, or other foreigner, who is a minor at that age by the laws of his domicile, comes to Scotland and enters into contracts there, is he to be held major by our courts? If minority is a merely local matter, variable with every change of place, he must be held major; if, on the other hand, it is purely personal, and dependent on the laws of his domicile, he is to be held a minor. Suppose, again, that, as is the rule in some countries (*c*), a person attains majority at eighteen. Having thereby acquired the status of majority, would he nevertheless be held a minor in regard to contracts entered into by him in Scotland, while his native domicile subsisted? Again, the decision must depend upon whether minority is local or personal. If we hold minority a purely personal matter, it is plain we must admit persons to the legal position of majors or minors at ages quite different from that fixed in this country (*d*). Nor, if we go to the

(*a*) Bouhier, Observations, c. 24, ss. 5, 11, 12, 13; Boullenois, tom. ii. tit. 4, c. ii.; Obs. 46, p. 467; Rodembourg, tit. 2, c. i. pp. 27, 28; Burge Com. vol. i. pp. 118–122, and authorities there cited; authorities cited in Story's Conflict of Laws, ss. 52, 53, 65, 67.

(*b*) Schrassert, Obs. 210, p. 327; 1 Burge Com. 129, 130, 131, 133; and authorities there cited; Story, s. 103.

(*c*) Such was the law in the Two Sicilies and in some German states.

(*d*) Majority was attained by the civil law at twenty-five, and this age is probably most generally adopted. Spain, Italy, Denmark, Holland, and Mexico, in this follow the Roman law; the Canton of Vaud fixes twenty-three; France, and the countries which have adopted the French Code, fix twenty-one for majority, except as to marriage; in Russia, majority is at twenty-one, but at eighteen certain additional powers are given; the custom of Nor-

opposite extreme, and regard the legal disabilities of minority as a merely local matter, is the way free from difficulties. If this be the rule of Scotch law, what shall be said if a Scotch lad of eighteen, in the course of his travels, comes to a country where all males attain majority at that age? Shall we hold his legal acts in that country as entitled in our courts to all the obligatory force of the deeds of an adult? It is hardly possible to escape from this result unless by holding him major *pro tempore* in regard only to contracts regarding moveables, but still minor as to his Scotch heritage; that is, we must determine the status of minority to be partly local and partly personal. Other cases might be put, but these illustrations will suffice to show the nature of the difficulties for which a solution is required.

Argument in favour of capacity of minor being variable according to place of contract.

The argument in support of the doctrine, that minority or majority is a merely local matter, variable with every change of place out of the country of the domicile, is mainly derived from the inconveniences of the opposite doctrine. The inhabitants of each nation are ready to receive the visits of foreigners, and to contract with them if the visitors please so to do. But it would be very difficult for private citizens of this country to ascertain whether or not a foreigner, who proposes to trade with them, is or is not a minor by the laws of his domicile. The courts of this country, with all the means at their command, may have sufficient difficulty in ascertaining the foreign law upon this point; but to require merchants or tradesmen to do so, would impose a serious burden upon commerce. A man who contracts in a foreign country is there a *subditus temporarius* (*a*); he engages for a competent knowledge on his part of the law of that country, and his contracts must be held to be made with reference to that law (*b*).

If the law of his domicile lays much weight upon the disabilities which it imposes on a minor as intended for his protection, it might have made this protection certain, by preventing him from passing

mandy, which obtains in Guernsey, fixes majority at twenty; and this is also the age in Brazil. On the subject of different stages of minority by Roman law, see Colquhoun, Civil Law, ss. 359, 366. By emancipation by marriage and by *venia ætatis*, the status of majority is attained in some countries.

(*a*) Huber, Prælect. i. 3, s. 2. *Low* v. *Routledge*, 1 L. R. Eq. p. 42.

(*b*) Story, s. 76. Lord Stowell in *Dalrymple* v. *Dalrymple*, 2 Hagg. Consist. Rep. p. 61.

out of its jurisdiction. Once within Scotland, the only convenient rule is to hold him as subjected, by his own act and the tacit consent of his guardians, to the laws of Scotland, as to legal capacity to contract.

This seems nearly all which can be said in favour of a doctrine which makes a person's status as major or minor vary with every different country into which he comes, no matter for how short a time. If adopted in its whole extent, it plainly affords great facilities by which minors, to their own injury, and perhaps to the benefit of designing persons, might escape from the protection of their domiciliary laws by a brief journey to a foreign country.

Argument in favour of the law of domicile.

The doctrine which makes the status of minority or majority purely personal, and dependent on the law of the domicile, is founded in respect for that law in preference to the possible convenience of the subjects of one country. This respect is grounded on the consideration that the law of the domicile, having regard to differences of climate and national character, is best qualified to determine for its subjects at what age they shall attain majority. If any inconvenience arises from the necessity of referring in this country to the law of a foreigner's domicile, in order to ascertain his legal capacity, such inquiry is only one of many which every prudent merchant should make before entering into any important transaction with a stranger. The chief risk in this country lies in contracting with one who, while a major in Scotland, is minor by the laws of his domicile; but the risk is practically much lessened by the fact, that such a person, not being in the full management of his estates, cannot generally be in a position to satisfy the first commercial requisite of showing funds at his command. Moreover, if such a person were to make any fraudulent statements as to his capacity by the law of his domicile, the contract would justly bind him not only here, but in the courts of his domicile. On the other hand, if we proceed on the footing of refusing to recognise as minor, according to the law of the domicile, a person beyond the age of Scotch majority, it is not unlikely that the courts of the domicile would refuse to enforce his contracts made in Scotland if invalid in the domicile by reason of minority.

Which of these two doctrines should be adopted in Scotland, seems, as a matter of legal principle, to depend on whether ques-

tions touching minority or majority pertain to the law of status or the law of contracts. Does our law make a clear distinction between the law affecting the legal capacity of persons—their legal abilities or disabilities as dependent upon age—and the law relating to the validity of contracts?

Principles of international law recognised in Scotland.

This distinction, if it exist in our law, may seem to determine what principle of international law will be followed here in deciding the questions which we have been discussing. There are three principles of international law as recognised in Scotland, which may possibly be applied to the decision of these questions: (1.) The principle established in *Lippman* v. *Don* (*a*), that the *lex loci contractus* fixes the validity of the contract, while the *lex fori* is supreme over all the remedy for non-performance. (2.) The rule *locus regit actum*, in virtue of which, excepting as regards heritage, the external form and ceremonies of a legal act or contract, whether written or verbal, have been in many cases held valid, if according to *lex loci actûs*. (3.) The principle that *status*—all that relates to the condition of persons—depends on the *lex loci domicilii*.

The second of these principles, it is obvious, can only be applied to these questions of minority by giving it an extent beyond its due limits. The choice is consequently restricted to the principles above mentioned in the first and third places, the former of which applies to the law of contracts, the latter to the law of status.

Questions as to majority and minority belong to the law of status.

By the law of Scotland, questions touching minority or majority belong to the law of status. Minority is a condition of legal disability instituted by our law for the protection of young persons. The legal incapacity during pupillarity differs in some degree from that which exists after puberty, to the attainment of the age of twenty-one, but it possesses the same protective character throughout. As a matter of legal principle, then, it may seem that our law must, in consistency with itself, hold minority to be a purely personal matter, dependent upon the *lex domicilii*, according to the rule of international law relative to status.

Law of Scotland favours the *lex domicilii*.

There is, however, no direct decision to this effect. Nay, in some old cases there are expressions of judicial opinion which seem to point to an opposite conclusion (*b*). But the tendency of

(*a*) 3 Ross L. C. p. 847.

(*b*) See Lord Meadowbank's opinion, Ferg. Div. Cases, p. 361, App.

the law in the present day seems to be distinctly towards giving extended effect to the dependence of *status* upon domicile. In regard to questions of marriage, divorce, and legitimacy, the *lex loci*, where the celebration of marriage, the act of adultery, or the birth of the child took place, is by the later cases much restricted in its application; and the bearing of such acts upon the legal condition of the persons is more steadily referred to the law of the domicile.

Modern continental practice in favour of the *lex domicilii*.

If this be the law of Scotland in regard to the status of minority, our law is in accordance with the principles of international law established by custom on the Continent. Almost all continental jurists of the present day are agreed in holding that all questions of status, including those relating to minority, are to be decided in every country by the *lex domicilii* (*a*). This doctrine is expressly incorporated in the codes which have been in modern times established in many countries. The Code Civil in France, art. 3, provides, 'Les lois concernant l'état et la capacite des personnes régissent les Français même résident en pays étranger.' And the like universality which is thus claimed for French law of status in foreign countries, is conceded by the French courts to the *lex domicilii* of foreigners in France (*b*). The provision in the Austrian code, sec. 4 (*c*), is express: 'The personal capacity of strangers for legal transactions is in general to be determined according to the laws of the place to which the stranger, in respect of his domicile, is subject.' The codes for Belgium, Poland, Bavaria, Sardinia, the Papal States, and some of the Swiss Cantons, and other minor states, are the same in effect. Russia and Holland seem to be the only countries whose codes insist on the status of their own subjects being determined by their provisions, even in foreign countries;

(*a*) The opinion that the *lex loci contractus* universally decides over the capacity for legal action is, among the writers of the European continent, hardly represented. Bar Internationale Priv. und Strafrecht. p. 159, s. 45. Heineccius, Prælect. ii. c. 11, s. 5. De Chassat, ss. 241, 246.

(*b*) Pardessus Droit Commercial, P. 6, t. 7, c. 2, s. 1; Soloman Condition Juridique, pp. 32, 33. See Foelix, s. 32, where a review of the laws of Europe on the subject will be found. Gand des Etrangers, ss. 481, 486, 503, 506, differs. The provisions of the Code Civil frequently render the practice of the French courts in international questions quite exceptional, and they are rather to be regarded as capricious and arbitrary rules, than as expositions of international law.

(*c*) Quoted by Savigny, vol. viii. System of Roman Law, p. 145, s. 363.

but which, at the same time, refuse to recognise the provisions of foreign laws as to the legal capacity of foreigners who come into their territory (*a*). In Prussia, the general rule is for recognition of the *lex domicilii;* but in order to avoid the difficulty of ascertaining foreign law, it is provided that the contracts of a foreigner in Prussia, with regard to things within Prussian territory, shall be valid if either the *lex domicilii* or the Prussian law sustain his legal capacity thereto (*b*).

The laws of England and America favour the *lex loci contractus.*

In England and America it is said that international questions of minority or majority are regulated by the principle established in *Lippman* v. *Don* as to the validity of contracts. It is admitted that 'the capacity, state, and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired, and contracts made in the place of their domicile, touching property situate therein. If these acts, rights, and contracts have validity there, they will be held equally valid everywhere. If invalid there, they will be held invalid everywhere' (*c*). This rule is one which can hardly be disputed. 'In regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicil of birth, or the law of any other acquired and fixed domicil, is not generally to govern, but the *lex loci contractûs aut actûs*, the law of the place where the contract is made or the act done. Therefore, a person who is a minor until he is of the age of twenty-five years by the law of his domicil, and incapable as such of making a valid contract there, may nevertheless in another country, where he would be of age at twenty-one years, generally make a valid contract at that age, even a contract of marriage' (*d*). Mr Justice Story quotes, in support of this doctrine, three cases in the Supreme Court of Louisiana (*e*), in one of which (that of *Saul* v. *his Creditors*) the conflict last men-

(*a*) Bar, s. 45, p. 158, note 8. The existing law of Holland seems to coincide with the doctrine supported by J. Voet, de Statutis i. 4, 2, s. 9.

(*b*) Savigny, vol. viii. p. 143, s. 363.

(*c*) Story, s. 101.

(*d*) Story, s. 103. See also Burge Com. on For. Law, R. 19, ch. i. pp. 27, 28. De Chassat, ss. 241, 246, adopts this opinion with important modifications. Gand, ss. 481, 485–6.

(*e*) *Baldwin* v. *Gray*, 16 Martin R. 192; *Saul* v. *his Crs.*, 17 *ibid.; Andrews* v. *his Crs.*, 11 Louis. Rep. 464. See Story, s. 76.

tioned occurred, and was decided in the manner approved by him. In the English reports there is little or no direct authority on the precise point under discussion, though in one case at Nisi Prius it was held by Lord Eldon that the *lex loci contractûs* determines the validity of an English minor's contract (*a*). A recent English writer on the subject of international law, who bases his work on Savigny's, and incorporates a large portion of the treatise on International Law contained in the eighth volume of Savigny's system with his own, seems to hold Mr Justice Story's doctrine as that which is adopted in England. He says, 'While the English law remains as it is, it must on principle be taken as excluding in the case of transactions having their seat here, not only a foreign age of majority, but also all foreign determinations of status or capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the Continent' (*b*).

The domicile to be regarded is that at the time of the fact in question.

II. If the law of Scotland holds, with the jurists of the Continent, that the status of minority is purely personal and dependent on the *lex domicilii*, the next question which arises is, What domicile is to be referred to? The answer to this question is, that the domicile existing at the time of the particular act or contract which is before the Court determines the law of the status. Should there be two domiciles in existence at the date of the act or contract, the principal, or that which is termed the domicile of succession, rules questions of status. But if a secondary domicile be established in the *locus actûs*, this might afford a reason for trying the validity of a contract according to the *lex loci*. The preference of the actually existing domicile by residence to the mere domicile of origin is recommended by most jurists, and it is in accordance with the doctrines established in the later Scotch cases upon matrimonial domicile. The effect of this rule may be illustrated by supposing that a Prussian minor at the age of twenty-two has transferred his domicile to Scotland. He will by the change of domicile at once become major. But the converse case is generally treated as an exception to the rule. If a Scotchman at the age of twenty-two has transferred his domicile to Prussia, according to the

(*a*) *Male* v. *Roberts*, 3 Esp. 163.

(*b*) Westlake, s. 402, p. 384. Phillimore, iv. c. 25, s. 548, opposes the current English doctrine. See also iv. c. 17, ss. 385, 389.

rule above stated, he ought to become minor. But it is held by foreign jurists, and it is the established practice of the Prussian tribunals, that in a case of this sort the status of majority remains notwithstanding the change of domicile. This exception is defended sometimes on merely equitable considerations (*a*), or on the principle of recognising well-acquired rights (*b*); but the result, on whatever principle it may be based, is generally accepted (*c*).

Though person be held minor, whether has he the capacity of minor according to the law of domicile or according to the law of contract?

III. When it is determined that the question, whether a foreigner is a minor or not, is to be left to the law of his actual domicile, it may still be contended that the extent or effect of the legal incapacity imposed by minority, must be determined by the *lex loci actus vel contractus*. We recognise, it may be said, a foreign age of majority; but a foreign minor in Scotland can receive here no further or other protection than is accorded by our laws to native minors. 'The whole order of society,' it was said by an eminent judge in a divorce case (*d*), 'would be disjointed were the positive institutions of foreign nations concerning the domestic relations, and the capacities of persons regarding them, admitted to operate universally and form privileged castes, living each under separate laws, like the barbarian nations during many centuries after their settlement in the Roman Empire.' This passage, it is true, does not refer in terms to the particular question now under consideration; but it is an illustration of the manner in which it may be argued, that because our courts will assuredly not recognise foreign law to certain effects, therefore they must refuse this recognition on all points.

Scottish courts will not enforce foreign law if it be repugnant to morality or the fundamental policy of Scotland.

That there are certain circumstances in which the Scottish courts will not apply foreign law, is quite clear. Thus, (1) if our law contains an express provision for the manner in which a judge is to deal with a certain conflict of laws, this must be followed, and the foreign law disregarded. Then (2) the Scottish courts will never lend themselves to the enforcement in this country of any provision of a foreign law which is repugnant to the conceptions of religion or morality here prevalent (*e*). These two exceptions

(*a*) Boullenois Traité des Statuts, 19.

(*b*) Savigny, p. 167, s. 365.

(*c*) Bar, s. 52, p. 171.

(*d*) *Pye* v. *Pye*, 1817, p. 17, Appx. to Ferguson's Consist. Law, *per* Lord Meadowbank.

(*e*) *Fenton* v. *Livingstone*, 3 Macq. 497, and *supra*, p. 56. See the cases in which the Scotch courts refused to recognise slavery: *Sheddan* v. *a Negro* (1757), M. 14545; *Knight* v. *Wedderburn* (1778), M. 14545.

are admitted by all writers on international law. Story (*a*) and others lay down still further restrictions upon the application of foreign law, but we are not at present concerned to examine them. The status of minority, whether divided into degrees for *impuberes* and *puberes* or not, is a legal institute *juris gentium* founded on natural requirements, and is intended for the protection of its subject, and not for the injury of the other nations as regards their public policy or the interests of their citizens.

Case of a minor foreigner contracting in Scotland.

The case now under consideration is, it will be observed, that of a foreign minor present in this country as a traveller, or for a time short enough to exclude the possibility of acquiring a domicile. The laws of his existing domicile protect him, by rendering him legally incapable of entering into any transactions by which his person or his property may be affected, or this general incapacity is subject to some exceptions in regard to certain parts of his property. It is assumed that this incapacity, whether it applies to the whole or only part of his estate, is absolute; that it does not merely amount to a prohibition of a few transactions, such as the granting of bills, the object of which may be attained circuitously by other forms not forbidden.

Now there seems to be nothing incongruous in holding that Scottish citizens, before entering into important transactions with a foreigner so situated, shall ascertain the extent of the incapacity which the law of his domicile has judged best for him. If, for example, he proposed to enter into marriage with a Scotchwoman here, while the laws of his domicile render the marriage of a minor null when without the consent of his parents or guardians, surely there is nothing unreasonable in expecting that proper inquiries will be made beforehand as to his legal capacity. Should this obvious precaution be neglected on the part of any subject of this country, there would be no hardship of which complaint could be justly made, did the Scottish courts decide for the invalidity of the marriage according to the *lex domicilii*. It is possible, however, that the Scottish courts would regard such restraints upon mar-

(*a*) Story, s. 244 *et seq.* Savigny, vol. viii. s. 349, p. 33, says that our courts are not to enforce (1) foreign laws of a purely positive, compulsory nature; (2) legal institutes of a foreign state which are completely unknown among us.

riage as opposed to the fundamental principles of Scotch law, and for that special reason not entitled to recognition, to the effect of voiding a Scotchwoman's marriage with a foreign minor.

Will Scotch courts recognise the incapacities of foreign minority?

On the general question this much may be said, that if our courts shall recognise the provisions of a foreign law as to the existence or non-existence of the condition of minority, it is only a natural consequence that they should also recognise the full extent of incapacity which the foreign minority implies. To do otherwise would almost be to take away with one hand what is given by the other. But it must not be assumed that all foreign minors are under greater incapacities than Scotch minors. The effect of applying the *lex domicilii* may sometimes be to deprive the foreign minor of privileges which he would otherwise possess here. Thus it is said that *restitutio in integrum* on the head of minority should not be allowed to a foreign minor if it would not be allowed him by the *lex domicilii* (*a*).

While it is thought, then, that the law of the domicile should in general determine not only the age, but also the legal effects of minority, it cannot be said that the Scottish courts have adopted this view, because our reports present us with no direct precedents. In England, the cases relative to Gretna Green marriages (*b*), and the case at Nisi Prius already referred to, seem to show that the English courts recognise the validity of a minor's contracts according to *lex loci contractûs*, although they would not have been binding in England.

Review of the whole questions.

But deference in general to the *lex domicilii* on the whole questions relative to minority which have now been reviewed in their order, depends throughout on the principle of applying the law to which each case justly belongs, and does not necessarily exclude the *lex loci contractûs* as to legal capacity from some of the most ordinary contracts of every-day life.

If we consider that the status of majority or minority in each country is presumably founded upon national peculiarities, and presupposes uninterrupted continuance for a length of time in

(*a*) Bar, s. 56, pp. 187-8. See Savigny, *contrà*, s. 365, p. 164.

(*b*) According to Lord Brougham, the validity of such marriages has never been absolutely decided.—*Fenton*, 3 Macq. 535. See Fraser on Personal and Dom. Relations, vol. i. p. 724.

order to be of any use, we may well conclude that the Scotch law of minority is, generally speaking, from its very nature, not intended for foreigners, and cannot be justly applied to them. These considerations suffice to fix the application of the *lex domicilii*, where the minor alone is principally concerned. That law accordingly should be applied to a foreign minor in all questions which may arise in our courts regarding his personal and domestic relations not dependent on contract, and his powers relative to the management of his property. But where questions arise out of the minor's contracts, his interests are by his own act complicated with those of strangers, and there cannot justly be any absolute rule for the application of the *lex domicilii*. When the minor's domicile is also the place of the contract, no one disputes that the *lex domicilii* is alone applicable. Difficulties arise exclusively as to acts or contracts made or entered into by a foreigner in Scotland who has not acquired a domicile here. In regard to such Scotch acts and contracts, the cases where the minor is bound by the *lex domicilii*, though free by Scotch law, and where the determinations of both laws as to his legal capacity or incapacity are the same, may be put aside. In these cases there can be no difficulty in giving practical effect to the law of the domicile.

Where *lex domicilii* gives a minor more protection than is given by Scotch law.

The cases which admit of dispute are those where the *lex domicilii* gives the protection of a legal incapacity greater in extent or in duration than is accorded by Scotch law. In regard to these cases, international law, according to its modern treatment (*a*), expects our courts to interpret the particular act or contract laid before them so as to do justice to the Scotch contracting party as well as to the foreign minor. It is not the duty of our courts to decide whether the Scotch law of minority is more just and reasonable than the foreign law, but simply which law is in the circumstances of the case justly applicable. On the one hand, the mere fact of one party being under a foreign law of minority does not by itself render that law justly applicable; quite as little, on the other hand, does the mere fact of his entering into a contract in Scotland subject his legal capacity to the exclusive determination of the *lex loci contractûs*. It is consequently for our courts to consider whether or not, in the whole circumstances of the actual

(*a*) Savigny, viii. s. 349, p. 29; Bar, s. 26, p. 58.

case presented for decision, the element of a foreign minority has been introduced. A legal act or contract may possibly occur in such circumstances as to render the Scotch law as to minority justly applicable, and to exclude the foreign minority as an element in the legal relations between the parties. If in any case the foreign minor has fraudulently and directly affirmed his legal capacity, and the Scotch contracting party, having no knowledge to the contrary, has been in fact thereby deceived, then the minor cannot be permitted to take advantage of his own fraud (*a*). But where such fraud is not alleged, it is thought that these cases may be solved by bringing each to the issue whether the Scotch contracting party knew, or ought to have known, the legal condition of the foreign minor.

Foreign minor fraudulently affirming himself major.

If it can be proved that a native of Scotland is from any source aware that a foreigner is a minor by the laws of his domicile, and that the contract or transaction into which the latter proposes to enter with him is forbidden to minors by the *lex domicilii*, then the foreign law should be applied. If, however, the foreign origin and minority were unknown to the Scotch contracting party, then it might reasonably be deemed a jury question, whether in the circumstances it was the duty of the Scotch subject to inquire into the legal condition of his obligor. He is not bound to know a foreign law as he is to know his own; but in contracting with a foreign minor in Scotland he is bound to act *in bona fide*, and with reasonable care and prudence; and this duty may involve the ascertainment of the law of the minor's domicile, and render that law justly applicable.

If foreign minor contract with a Scotsman, it is question of evidence whether or not latter should have known the foreign status.

There are transactions of such character or importance as, from their very nature, to put a Scotch contracting party upon his inquiry. Other circumstances, as the apparent age of the obligor, and the known place, duration, and object of his Scotch residence, might have the same effect. On the other hand, there are contracts which, from their very nature, seem to exclude the duty of inquiry, and to entitle the Scotch contracting party to assume that the *lex loci contractûs* is to rule. Thus, a Scotch minor may engage in trade, and as a trader may validly affect his person and estate by contracts in *re mercatoria*, and minority cannot be pleaded against

(*a*) Soloman Condition Juridique, pp. 36, 37.

such purely personal debts as hotel bills incurred by a Scotch minor on a journey or a holiday residence (*a*). It would be unreasonable, in the ordinary practical conditions of mercantile affairs and social life, to hold a Scotchman bound in these matters to inquire into foreign laws. Hardly any circumstance, except direct and specific warning by the guardians of the foreign minor, should have the effect of putting the Scotch contracting party in *mala fide*, and thereby leading to the rescission of such contracts.

Foreign minor's liability for hotel bills and the like.

The principles which have now been indicated for the solution of these international questions are in consistency with the mode in which the Scottish courts decide questions upon the application of their own law of minority (*b*). The validity of contracts in *re mercatoria* and for board and lodging, even as against foreign minors, may, however, be maintained on other principles. The liability of Scotch minors upon such contracts is founded in regard for their benefit and convenience (*c*); and the same considerations apply just as strongly to foreign visitors. Moreover, since the funds of Scotch minors may be applied in payment of such debts incurred abroad, it seems in accordance with the reciprocity which is at the basis of private international law that a foreign minor should be liable for such debts here incurred, although the *lex domicilii proprio vigore* does not concede him the legal capacity for their contraction.

In illustration of the distinction which may be taken between cases, according as their circumstances do or do not put a native contracting with a foreigner upon his inquiry, two recent decisions in the French courts may be referred to. A young Mexican twenty-two years of age, and therefore not yet major by the laws of his domicile, while residing in Paris in family with his mother, bought in 1853 and 1854, in distinct transactions from four different tradesmen, jewellery and plate to the amount of upwards of 95,000 francs. The amount supplied by each tradesman separately was not beyond what might seem to a prudent tradesman suitable

(*a*) Applied in the case of an English minor, *Wilkie* v. *Dunlop*, 28 Feb. 1834, 12 S. 506.

(*b*) *Kennedy* v. *Weir*, M. 11658; *Wemyss* v. *Crs.*, M. 9025; Ersk. i. 7, 36; Bell's Com. i. 18.

(*c*) See *Dennistoun* v. *Mudie*, 31 Jan. 1850, 12 D. 613; and especially the opinions of Lords Ivory and Fullerton.

to the fortune and style of life of the minor. The goods had been in most instances sent to the minor at his mother's house, and no warning had been given by any of the family against the minor's orders. On attaining majority, the purchaser raised a suit to set aside the contracts. The tradesmen pleaded that they had contracted with the pursuer as a person of full age, and in the ordinary course of business; and that they were ignorant of his being a foreigner as well as of his being a minor by the laws of his domicile. The Cour de Cassation, in 1861, held that, while the *lex domicilii* must govern in the general case, French subjects in regard to contracts in France with foreigners are not necessarily bound to know, and consequently not blameable for being ignorant of, foreign ages of and dispositions concerning minority. It would be enough for the validity of such a contract that the French subject has entered into it without rashness, without imprudence, and in good faith. Applying this principle, the Court sustained the contracts. They held, in effect, that the tradesmen were not put upon their inquiry.

But a former case of the same minor, which occurred in 1858, had in different circumstances the opposite result. Lizardi and his tutor there sued for reduction of certain bills which the minor at the age of twenty-two had granted to a French firm to the large amount of 600,000 francs. The Court of Appeal applied the *lex domicilii* as to the age of minority, and held the bills bad; because they were not real commercial transactions, but mere loans to the minor under a commercial form, and because it was the duty of the holders in the circumstances to have inquired as to his legal capacity before taking them from the minor (*a*).

Minor's power to dispose of his heritage *inter vivos*.

There seems no reason why the principles now indicated should not be applied to the dealings of any British minor not domiciled in Scotland in reference to his Scotch heritable property. In regard to heritable subjects, there are many points in which the *lex rei sitæ* is exclusively to be consulted. It must determine what things corporeally situated within its territory are to be regarded as heritable, and what as moveable (*b*). It may, as our law does, define those who can become owners of heritable subjects so absolutely as to exclude aliens altogether from that right. It

(*a*) *Lizardi* v. *Chaize et al.*, Sirey 1861, i. p. 305.
(*b*) J. Voet i. 4, 2, s. 11.

also fixes the forms of heritable conveyances. But the provisions of Scotch law as to the disabilities of minors in reference to heritable property are not, like the forms of deeds and the system of registration, part of the peculiar law of real property. They belong to the law of status, and are part of the provisions which Scotch law, having regard to the circumstances of its subjects, makes for their protection during the lengthened period of their nonage. The whole provisions as to minors have in our legal system a necessary correlation; they are made with reference to, and imply, each other. It would be arbitrary, and contrary to a rational interpretation of our law of minority as a whole, to apply some of its provisions relative to heritable property, while the minor's disabilities in other respects were left to a foreign law. This would do violence to the spirit and intention of the Scotch law of minority, while it would not enable the *lex domicilii* to provide consistently and completely for the protection of its minor subjects.

Notwithstanding, then, the authority of John Voet (*a*) and Huber (*b*) for the absolutely unbending character of the *lex rei sitæ*, judges are hardly warranted, in these questions as to the existence and effect of a purely protective status, to make any exception in favour of the *lex rei sitæ* in regard to transactions *inter vivos* relative to heritable property (*c*). Indeed, it may well be thought that contracts and deeds *inter vivos* regarding heritable property into which a native enters with a stranger are precisely those which,

(*a*) Voet i. 4, 2, s. 12, modified at 4, 4, 8.

(*b*) Huber Prælect. i. 3, ss. 12, 14.

(*c*) 'The capacity for legal acts and contracts is to be determined even in relation to immoveables by the *lex domicilii*. If according to the *lex rei sitæ* one is yet a minor, while by the *lex domicilii* he is of full age, he could validly enter into any merely personal obligation relative to his outlying land-estate. It would follow that the purchaser whose right stands merely upon this personal obligation needs only to sue for implement; and since decree could not be refused him, matters would be brought into exactly the same position as if alienation by the owner had been held valid at first. The application of the *lex rei sitæ* is consequently in this case quite impracticable. Its application to the converse case, where the disponer is of full age by the *lex rei sitæ*, but a minor according to the law of his domicile, leads to this absurdity, that one who is incapable of undertaking a personal obligation for the transference of a real right is yet in a position to grant a conveyance.'—Bar, s. 64, p. 209. See also, to the same effect, Rodemburg, tit. ii. c. 1, and Merlin Rep. Majorité 5. Different views are held by Gand, ss. 482–3, 486; Story, s. 431; and Burge, i. p. 120.

from the care and deliberation due to their importance, most distinctly lay upon the Scotch grantee the duty of inquiring into the legal capacity which the law of the granter's domicile confers upon him.

Minor's power to make settlements *mortis causâ*.

Settlements truly and in substance *mortis causâ* are, however, in a totally different position. The power of altering the legal succession in heritable subjects is a faculty dependent entirely upon the *lex rei sitæ* (*a*). The conditions and restrictions under which alone that law permits its appointed succession to be altered by the Last Will of the owner, rest upon a principle different from that on which the law of minority is based. They are not intended for the owner's benefit as a minor, but for the protection of his heirs-at-law. Accordingly, the age at which the law of the domicile confers the *testamenti factio* cannot be considered; and Scotch law must alone decide when a non-domiciled owner of Scotch heritable subjects shall have the capacity to dispose of these subjects *mortis causâ*. The *testamenti factio* as to moveables, on the other hand, is exclusively regulated by the law of the domicile (*b*).

Capacities of alleged foreign lunatics.

IV. In regard to the question as to the effect of a foreigner being by the laws of his country subject to the incapacities attaching to lunatics or persons interdicted for facility and prodigality, continental jurists place this also among questions of status, and determine it precisely in the same manner as questions of minority (*c*). Certainly in this country no effect would be given to any legal incapacity merely dependent upon the decrees or proceedings of a foreign tribunal, until those decrees were here produced. When produced, they might be received as proof of incapacity till redargued. But a foreign interdiction, even when properly vouched here, could hardly have any effect in this country till publication according to the forms of Scotch law (*d*).

V. We have now discussed the principles upon which it is to be decided whether a foreigner is or is not *alieni juris*, and what is

(*a*) Stockman's Decis. Brabant. No. 50. Boullenois Obs. 28, p. 718. Bouhier, c. 23, ss. 91, 93, 94; c. 24, ss. 93, 103. Bar, s. 107, p. 376 *et seq.*; s. 108, pp. 391–2. Savigny, s. 377, pp. 311–12, decides for the *lex domicilii* universally.

(*b*) Burge iv. 580.

(*c*) Bouhier, c. 24, s. 30.

(*d*) J. Voet xxvii. 10, 11; Phillimore Int. Law iv. 25, s. 502; Gand, ss. 513, 514.

the extent and effect of the incapacity attaching to him personally with regard to his legal acts and contracts. The next step is to consider the relations in which foreign guardians of minors stand to our law.

Paternal power of aliens.

The paternal power of aliens naturally occupies the first place in this subject. Now, there is no reason to doubt that our law agrees with that of England in recognising this power in aliens subject to our jurisdiction (*a*). But what is the extent to which our law will go in its recognition of the *patria potestas?* In regard to the property of the child, a foreign father cannot have less powers than those, whatever they are, which are conceded to foreign guardians, provided always that the *lex domicilii* confers upon the father a right of administration analogous to that which Scotch fathers possess. It may be that the powers of the *lex domicilii* in this respect, if they exceed those conferred upon Scotch fathers, will nevertheless be recognised in our courts (*b*); and certainly, if any reasons exist for this in the case of mere guardians appointed in the foreign domicile, these must apply with much greater force in favour of the father.

The paternal power over the person of the child is a matter of even more delicacy. On the one hand, it has been said by Lord Justice-Clerk Boyle: 'To suppose that persons coming within the territory of a different state import alongst with them the whole peculiarities of the law of their own, and are entitled to insist on having effect given to them there, however repugnant they may be to the law of the country of their residence, is contrary to every rational principle of general jurisprudence, and has not been shown to be supported by any state in questions of this nature.' 'There cannot be a doubt that if, in regard to the relation of parent and child, there existed in any modern state any institution similar to the *patria potestas* of that of Rome, the natives of such state would not be permitted to exercise here that which might be lawfully used as their privilege at home. And so in the case of guardian and ward' (*c*). But his Lordship's opinion is given subject to

(*a*) *De Manneville* v. *De Manneville*, 10 Ves. 52. Here a French emigrant was forbidden to remove his child, born in England, out of that country.

(*b*) Phillimore iv. c. 23, s. 527; Gand, ss. 310, 473, 476, 478.

(*c*) *Edmonstone* v. *Edmonstone*, 1 June 1816, F. C.

limitations which are plainly authorized by international law; and it is a very different matter, not at all contemplated by his Lordship, to hold that we shall not consider to any effect the paternal power over the person given by the *lex domicilii*, and shall regulate the personal relations of parent and child exclusively by Scotch law. It must always be remembered that we are here dealing with the personal relations of persons who are not domiciled in this country, but are merely temporarily resident, or even only travelling here. Possibly, should the question arise in our courts, it will be found that it is according to sound international principles to recognise the provisions of the *lex domicilii* as to paternal power, where these are plainly intended for the good of the child, and are not contrary to the moral sense of this community. The case of a father applying for the assistance of our magistrates to stop a marriage of his minor son, which he was in time to prevent, would not necessarily fall under this exception. Cases, however, might be figured in which the foreign law would so grossly shock our ideas of the respect due to the personal liberty of minors, as to entitle our courts to refuse all aid to the enforcement of the paternal power in these respects (*a*). It will, however, be understood, that on these points these remarks are not supported except inferentially by any reported cases. It was certainly a *ratio decidendi* in the celebrated English case of *Beattie* v. *Johnstone* (*b*), that a foreign father's powers over the person of his child were in England exclusively those given by English law. But this case, as will be seen, has been condemned by the House of Lords; and the particular reason now referred to, as well as the decision itself, are contrary to international law as understood by the most eminent continental lawyers. A German writer (*c*) lays down the rule upon the subject in these terms: 'The purely personal relations between parents and their legitimate children are always, like the personal relations of spouses, to be judged according to the *lex domicilii* of the persons affected, under the limitation that no one can be allowed to make rights effectual in a land which are there regarded as immoral or unbe-

(*a*) Phillimore iv. c. 23, s. 524; Gand 472–3.

(*b*) See Lord Cottenham's opinion, 10 Cl. and Fin. p. 113.

(*c*) Bar, p. 353, s. 101; Bouhier, c. 24, ss. 37 to 61.

coming.' It has been held by Lord Chancellor Westbury, that on the decease of a father of the Roman Catholic religion, his infant child should be educated in that form of Christianity, and this may be thought analogous to the recognition of personal relations foreign to the law of England (*a*). Finally, in considering whether or not the paternal powers of a foreign father are to be measured by the *lex domicilii*, it must be remembered that the legal determinations of each state upon the *patria potestas* are, even more than those upon the other questions of status which we have discussed, of a peculiarly personal and domestic character, and are founded, at least in part, upon various circumstances peculiar to each nation. It may well be said that our laws on the personal relations are not passed for the regulation of foreigners at all, and that to apply them to the *patria potestas* of foreign fathers, or even to the disabilities of foreign minors, is to give them an extension beyond their rational limits.

VI. The powers of foreign guardians of minors shall be considered as regards (1) the person; (2) the moveable; and (3) the heritable estate of the ward.

Is the power of the guardian according to the *lex domicilii?*

On this subject, the question whether the international principle relative to status is to be applied becomes of importance. If it is kept in view that the relation of guardian and ward belongs to the law of status, international law at once points out the *lex domicilii* as of paramount authority. In regard to the condition of minority, it has been already shown that on the Continent well-established principle and practice support the application of the *lex domicilii*. The state of international law on the Continent relative to guardian and ward is precisely the same. Hardly any continental jurists of modern times support the doctrine of Mr Burge (*b*), that 'when the minor or lunatic comes within the jurisdiction of a foreign tribunal, he ceases to be subject to that of the tribunal which had previously placed him *sub tutela*, and becomes subject to the jurisdiction of the tribunals of the country to which he had resorted.' This is the rule which, according to Mr Justice Story (*c*), is recognised in American practice.

The powers of foreign guardians over the person of their ward

(*a*) *Austin* v. *Austin*, 34 Law Jour. Ch. p. 499.

(*b*) Burge's Com. iii. 1003.

(*c*) Story, s. 499.

were some time ago the subject of an important decision in the House of Lords (*a*).

Powers of foreign guardians over ward's person.

A domiciled Scotchman appointed testamentary tutors to his child, and after his death the tutors accepted the office. The mother took the child to England, where it resided till the mother's death. A dispute then arose between the maternal grandfather, who was resident in England, and the testamentary tutors, who were domiciled in Scotland, as to the custody. There was no property whatever in England; and it appears to have been held that the child's domicile was in Scotland, *that* having been the domicile of her father, which her subsequent residence in England with her mother was not of such a nature or duration as to change. The question then came to be, whether the courts of England would recognise the Scotch tutors, or appoint a guardian of their own. Lord Chancellor Cottenham, in the Court of Chancery, refused to recognise the Scotch guardians, and ordered that it should be referred to the Master to approve of a proper person to be appointed guardian. The case was appealed to the House of Lords, when Lord Chancellor Lyndhurst and Lord Cottenham were of opinion that the judgment under appeal was correct, while Lord Brougham and Lord Campbell held it to be erroneous. The case was again argued when Lord Langdale was present, and he agreeing with the Lord Chancellor and Lord Cottenham, the judgment of the Court below was affirmed.

The majority held, that to recognise the authority of foreign guardians, would lead to the greatest confusion and difficulties. The powers of guardians are different in different countries; and therefore the question arises, whether, if the Scotch tutors be here recognised, their rights and duties are those of the law of Scotland, or the rights and duties which belong to guardians in England? If the former, then the English court must take upon itself to administer foreign law; and if the authority of foreign tutors were admitted, more deference would be paid to it than to that of a parent, who cannot, it was said, claim in England any authority not granted to a parent by the English law, whatever be the law of his native

(*a*) *Johnstone* v. *Beattie*, March and May 1843, 10 Cl. and Fin. 42. See similar case, as to an American guardian, *Dawson* v. *Jay*, 3 De G. M. and G. p. 764, explained in *Stuart* v. *Moore*, *infra*.

country or of his domicile. There would, moreover, be no conflict of jurisdiction between the courts of England and of Scotland, in having a guardian to the child's person in England, and tutors managing the estate in Scotland; for it is to be presumed the courts of the two countries will be equally anxious to do that which may appear to be most beneficial to the infant. Instead of conflicting with one another, why should not the respective courts of the two countries be mutually assistant in promoting their common object? Then, with reference to the point as to whether, seeing the English law will not recognise the authority of foreign guardians, it ought not to confirm them at once, and appoint them *de novo*,—this is a matter of discretion; and here, the Scotch guardians being out of the jurisdiction, and consequently not subject to the control and authority of the Court, it would not seem to be consistent with sound discretion to appoint them guardians.

On the other hand, Lord Brougham and Lord Campbell, while they admitted the jurisdiction of the Court over infants temporarily resident in England, held that the English courts were bound to recognise the authority of foreign guardians. This was a doctrine which they said was sanctioned by most of the authorities in the general law of Europe; and the manifest convenience of the *comitas* from which it springs, as well as the consideration that the appointment is eminently of a personal nature, appears to justify this position. If there were, from the nature of the thing, any local peculiarities in the law or the jurisdiction appointing guardians, there might be reason for disregarding the foreign appointment. This, however, was not the case; and although the Court had jurisdiction, it was limited to an inquiry as to whether the child already had guardians regularly appointed according to the *lex domicilii*. The appointment of an English guardian would be tantamount to the child's exile from Scotland, as the English guardian cannot permit her to go out of the Court's jurisdiction. To affirm the decision under review, would peril the freedom of every child taken to England for the most temporary purpose, as he might be impounded immediately on reaching that country, and made a ward of Chancery till his age of twenty-one. There is, moreover, no difficulty in compelling the Scotch tutors to perform their duty to their ward though in England, as they are account-

able to the Scotch courts, by whom they will be visited with punishment if they neglect their duty. The mere death of the father of an infant, domiciled abroad (but resident in England for health or education or amusement, with the consent of those in whom the parental power is vested by the law of the country of its domicile), cannot necessarily require the expensive, useless, and inconvenient process of the appointment of guardians by the Lord Chancellor. 'I presume,' said Lord Campbell, 'there is to be reciprocity on this subject; and that if English children go to Scotland for education or health, or to see the wild scenery of that country, tutors-dative may be appointed to them by the Court of Session, and they may be detained and educated in that cold and Presbyterian country.' Further, whatever may be the difference of opinion among jurists as to the rights of a foreign guardian over *property* in a foreign country, none of them assert that these guardians will not be recognised, so far as the care of the *person* of the infant is concerned. Even although the domicile of the infant here had been England instead of Scotland, this would not render guardians by the Court of Chancery less unnecessary or less detrimental. The property is in Scotland, and cannot be touched by the English guardian; and there is no averment that the Scotch tutors do not judiciously take care of that property, and of the person of the infant in England.

The decision of the House of Lords affirmed the order of the Court below, by which the nomination of Scotch tutors was set aside, and a remit made to the Master to suggest an English guardian (*a*). Regarding this decision, the Lord Justice-Clerk (Inglis) has made the following observations (*b*): 'The judgment of the House of Lords being pronounced on an appeal from the English Court of Chancery, is not an authority binding in Scotland; and when it was brought under the notice of the Scotch judges and the legal profession in Scotland incidentally some years ago, it was universally felt, that however sound an exposition it might furnish of the rules of English Chancery law, it involved a violation of the principles of international law recognised in Scotland and all the states of the continent of Europe, so direct and unequivocal, that I believe

(*a*) *Johnstone* v. *Beattie*, March and May 1843, 10 Clark and Fin. 42.
(*b*) *Stuart* v. *Moore*, 23 D. 914.

the very last thing that would ever enter into the mind of a Scotch judge, would be to follow the authority or adopt the principle of *Johnstone* v. *Beattie*.' The Scotch guardians, who had unsuccessfully applied to the English courts to have their authority over the person of their ward recognised in England, were in Scotland held to have acted properly, and to be entitled to payment of the expenses incurred by them in England out of the estate of the ward (*a*).

One of the necessary consequences of this English case of *Johnstone* v. *Beattie*, was that it became the duty of Scotch guardians to consider well before they ran the risk of having their ward impounded by the Court of Chancery. The advantages of education or residence in England might be too dearly purchased at such a cost. Accordingly, in the case of Spiers (*b*), the Court of Session only refrained from preventing the temporary conveyance of the ward to England upon the tutor explaining that there was no officious relative in England who could apply to Chancery, and that he took the entire responsibility upon himself. Though the Scottish courts have always held it improper for a guardian to remove his ward out of their jurisdiction, this particular case was founded on *Johnstone* v. *Beattie*.

Authority of foreign guardians will be recognised.

But fortunately the authority of this anomalous English decision has been shaken by the case of *Stuart* v. *Stuart* (*c*), decided by the House of Lords in 1861, during the Chancellorship of Lord Campbell. The proceedings in this case related to the disposal of the person of the Marquis of Bute, a pupil. The title which the ward bore is a Scotch one, but he is a British peer. His property in Scotland was of the value of £17,000 per annum, and his property in England and Wales yielded an annual income of £76,000. The decision of the House of Lords proceeded upon appeal from the Court of Session. Guardians had been appointed to the ward in England, and a tutor-at-law had been served and retoured in Scotland. One of the English guardians complained to the Court of Session that his co-guardian had on a certain occa-

(*a*) *Johnstone* v. *Beattie*, 1856, 18 D. 343.

(*b*) *Spiers*, 23 Dec. 1854, 17 D. 290. See previous cases, *Reoch* v. *Robb*, 14 Nov. 1817, F. C.; *Campbell* v. *Campbell*, 7 March 1833, 11 S. 544.

(*c*) *Stuart* v. *Stuart*, 4 Macq., 2d, 3d, 17th May 1861, p. 1 *et seq.*, reported in Scotland as *Stuart* v. *Moore*, 22 D. p. 1504, 23 D. pp. 51, 55, 446, 595, 902.

sion surreptitiously removed the ward from England to Scotland. He asserted that the domicile of the ward was English, and craved that the ward might be restored to him, in order that a scheme of education in England, settled by the Court of Chancery, might be carried out. The co-guardian who had brought the ward to Scotland alleged that the domicile of his father was Scotch; that since his father's death the ward had resided with occasional exceptions in Scotland; and that thus his domicile was and had always been Scotch, and that his return to Scotland had been with a view to prevent prejudice to his rights as a Scotch pupil. The removal of the ward to England was therefore resisted, and a petition was presented by the tutor-at-law to settle a scheme for the education of the ward in Scotland. The documents purporting to be decrees of the English Chancery, which formed the title of the English guardian, were not admitted to be correct; and it was in the Scotch courts matter of dispute between the parties whether the appointment of tutor-at-law in Scotland, or that of guardians in England, was prior in date. Looking to the widely different allegations made by the parties, the Court of Session was of opinion that no decision could be given upon the merits of the application until proof had been adduced. If they had acted upon the precedent of *Johnstone* v. *Beattie*, even though his domicile were English, they might, from the mere fact of finding the pupil within their jurisdiction, and without further inquiry into the facts, have refused the application of the English guardian.

But, as has been seen, this case is repudiated in Scotland, and a proof was allowed to the parties. In the meantime, arrangements were judicially sanctioned for the ward's residence and education in Scotland during pupillarity, or till the further orders of Court. No proof was adduced, in consequence of one of the parties, who was within the jurisdiction of the English courts, having been interdicted from leading evidence in the Scotch courts, and the whole proceedings in their then state were brought before the House of Lords. It was there held, (1) that the Court of Session ought to have been satisfied, without any further inquiry, with the production of documents purporting to constitute the English guardian's title to his office; (2) that the Scotch courts had jurisdiction over the persons of foreign minors who might chance to

be in Scotland (*a*), but that, upon production of a foreign title of guardianship *ex facie* valid, although disputed, they should have at once proceeded to consider whether his removal to England was for the ward's benefit; and (3) that if they were satisfied upon the latter point, they should have ordered delivery of the ward to the foreign guardian. The Court of Appeal thought there was no doubt that an English residence and education was for the ward's benefit, and they accordingly held that he must be given up to the English guardian's care.

There can be little doubt that this decision deprives the previous decision in *Johnstone* v. *Beattie* of all authority. It may even be thought that it goes too far in the opposite direction, by attributing to a foreign title of guardianship *ex facie* valid the effect of excluding all inquiries into the question whether the ward has not a domicile in this country. It seems, however, to be sound, in so far as it establishes, that when a foreign guardian applies in this country for the enforcement of his authority over his ward's person, it is not necessary to go through the form of appointing him guardian here. Upon being satisfied of the validity of his title according to the *lex domicilii*, our courts may at once proceed to make the requisite orders for securing effect to it in this country, without any such new appointment.

Benefit of the minor the primary purpose to be looked to.

This case further completely recognises the principle that the benefit of the ward is the object to be looked to in all international questions of guardian and ward; and that if satisfied on this point, the courts of this country will enforce a guardian's authority over the person of his ward in terms of the assumed *lex domicilii*. The Lord Chancellor's observations are explicit, although, as the Lord Justice-Clerk points out, he is mistaken in supposing that the Scotch courts recognised *Johnstone* v. *Beattie* as a precedent. 'The refusal to interfere,' said Lord Campbell, 'is rested on the decision of this House in *Johnstone* v. *Beattie*, and I do sincerely believe that this decision was the true cause why the Court of Session in this case refused to interfere. I regret that decision; and I must confess that in some of the proceedings in that case, and in the language of some members of your Lordships' House who took part in that

(*a*) A similar doctrine is generally recognised on the Continent. Gand, ss. 489, 490, 508.

decision, there was ground for the Scotch judges apprehending that the Court of Chancery was encroaching on their jurisdiction.' In Lord Cranworth's opinion occurs also a passage to the same effect: 'I would make a passing observation,' he says, 'upon the case of *Johnstone* v. *Beattie*. Perhaps it might have been a decision more consonant to the principles of general law, to have held there that every country would recognise the status of guardian in the same way as they undoubtedly would recognise the status of parent, or the status of husband and wife. But supposing that not to have been the view taken by this House, then there is nothing in the decision of *Johnstone* v. *Beattie* that could have been decided otherwise, or that could at all interfere with or touch the present question. For all that was decided there was, that the status of guardian not being a status recognised by the law of this country, unless constituted in this country, it was not a matter of course to appoint a foreign guardian to be English guardian, but that it was only a matter to be taken into consideration. That was all that was decided in that case; and whether or not (as I have already said) it might have been better to have held that the status of guardian was to be itself recognised without further inquiry, is quite immaterial to the present question.' His Lordship also intimates, that in future a Scotch guardian whose ward may happen to be in England shall have an order for delivery of his ward's person on production of his Scotch title, and without the necessity of submitting to the form of applying for appointment as guardian by the English courts, upon the sole condition of satisfying them that his proceedings are for the ward's benefit.

This principle, that the exercise of jurisdiction in the case of guardian and ward is to be regulated by regard for the ward's benefit, will be found fruitful of consequences in regard also to the power of foreign guardians over property, heritable or moveable, situated in this country. It is from this principle that on the Continent there is a general concurrence in holding that foreign guardians are to be allowed to execute their office according to the *lex domicilii* over property, whether moveable or immoveable, in another country. Le droit des gens qui veille au commun avantage et à la bonne harmonie des nations veut que cette nomination d'un tuteur ou curateur (par le juge du domicil) soit

valable et reconnue dans tous les pays ou le pupille peut avoir des affaires (*a*).

Acts of voluntary jurisdiction in appointment of guardians recognised universally on the Continent.

In continental countries, decrees pronounced *in foro contentioso* are sharply distinguished from such acts of voluntary jurisdiction as the appointment of guardians. While the former are recognised and enforced in other countries (except France (*b*)) under certain conditions and restrictions, the latter are generally allowed to be valid everywhere as a matter of course, if *ex facie* valid according to the forms of the jurisdiction in which they take place (*c*). The legal theory of this privilege in favour of the acts of voluntary jurisdiction whereby guardians are appointed, is well and briefly expressed by M. Fœlix (*d*): 'Ces jugements ne font que conférer une qualité pour faire valoir les droits d'une tierce personne.' Indeed, the difficulty which may be felt in perceiving the perfect consistency of this doctrine with the established principles of the law of Scotland, may be removed by considering foreign guardians as placed in an analogous position to that of trustees under a foreign deed, or commissioners under a foreign commission or power of attorney (*e*).

The foreign appointment of guardians recognised, though not made according to Scottish forms.

No doubt a foreign trust settlement would not apply to Scotch heritage, unless executed in accordance with our forms; but it has not been decided that the same rule will be applied to a foreign commission or power of attorney. Certainly foreign guardians, at least if they hold a judicial appointment valid according to the *lex domicilii*, are in a favourable position for claiming, in the interest of the minor owner, whose titles to heritage must of course be made up according to Scotch law, exemption from any needless technicality. This difficulty, in regard to the form of their official title, should not be felt in regard to Scotch moveables, while a foreign power of attorney is admitted as completely valid as to such estate. In regard to Scotch heritage, the difficulty in form might be got over by a reappointment in the Scotch form, without any prejudice to the principle of admitting the *lex domicilii* as regulating the administration. The provisions of that law, touching the admini-

(*a*) Vattel ii. 7, c. 7, s. 85.

(*b*) Gand, s. 619.

(*c*) Fœlix, ss. 454, 466.

(*d*) Fœlix, s. 468.

(*e*) This mode of viewing the subject was adopted by V. C. Wood, in a question as to the powers of a Scotch *curator bonis* in England. 'As a party abroad can assign his rights, I do not see why a court of competent jurisdiction should not transfer them when he becomes lunatic.' *Scott* v. *Bentley*, *infra*, p. 603.

stration of guardians, may be regarded as analogous to the trust purposes in a foreign settlement or commission here recognised. Nor is it in legal principle anything to the purpose to object that foreign guardians, as such, may have by the *lex domicilii* other and greater powers than our law would confer. So long as the foreign powers over the Scotch estate of an *incapax* owner are not other or greater than are given by our law to persons *sui juris* in the management of their property, there is nothing inconsistent in their recognition in regard as well to heritage as moveables. Still, from the influence of the feudal law in Scotland, it is only to be expected that considerable difficulty will be experienced in applying this principle to heritable property. Of the feudal system, in its full development, it may be said, without exaggeration, that it tends to the treatment of persons in regard to their individual interests as mere accessories to land. The question before our courts may be, whether they are constrained to defer to strictly feudal principles and conceptions in preference to the plain benefit of the ward.

Will foreign guardianship be sustained as to moveables and rejected as to heritage?

Upon this subject a German writer—Bar, who, after Savigny, has written the best book on private international law that has been published in modern days—has the following remarks, which, from their applicability in the main to well-known legal institutes of Scotland, may be quoted: 'An intermediate view allows indeed the guardianship to be valid for the moveables belonging to the ward in a foreign country, but requires, in regard to his foreign immoveable property, the appointment of a special guardianship.' 'Historically this view is to be explained in the following manner: Firstly, according to old German law, the nearest relative of the minor capable of bearing arms, being the person who either alone or preferably was the next heir in heritage, was called to the guardianship.' This seems analogous in principle to the Scottish tutory-at-law. 'It was a natural consequence to regard the guardianship as only an effect of the possible succession to the ward. So much the more was this the natural view, as according to the older German law, whereby the guardian gave security and rendered accounts to the next heirs alone, the guardianship in fact existed preferably in the interest of these heirs; and the guardian himself drew the income of the ward's heritage, at least according to the custom in many places, during the continuance of

his guardianship. Since now, according to the older German law, succession in immoveables is subjected to the *lex rei sitæ*, it is easily seen why the appointment of a guardian should be determined by the *lex rei sitæ*, and why the effect of an appointment of guardians by the *judex domicilii* should be limited to immoveable property in his own territory. Secondly, according to feudal law, the feudal guardian must fulfil the duties of the ward to the superior. This being so, it naturally depended on the *lex rei sitæ*, who could and should fulfil these feudal duties; and the confirmation of the superior was necessary when a guardian was appointed by the *judex domicilii* out of the territory, especially since, according to the older law, the superior was himself the feudal guardian, and would transfer the guardianship only to one of his vassals.' This seems analogous to the ward holdings which once existed in Scotland. 'From the great extension of the feudal relation, it is intelligible how the older writers failed to distinguish properly this feudal guardianship from the guardianship which was created entirely in the personal interest of the pupil. It is from this cause, that since theoretically the doctrine of landed property in the English common law is entirely founded on the feudal system, the English and North American practice requires the appointment of a special guardian, or at least the confirmation of the guardian named by the *judex domicilii*, in regard to the foreign real estate of the ward. According to modern law, on the other hand, the guardianship exists only in the interest of the ward, and it can no longer be regarded as a branch of the law of succession or of the feudal law.' 'For the nomination of a special guardian by the courts of the country in which the lands lie, no tenable ground any longer exists. This proceeding is further objectionable, because, if the guardian appointed by the *judex domicilii* is merely confirmed, and is left to follow the rules fixed by the *lex domicilii* for the administration of his ward's estate, the only result of the confirmation is unnecessary expense and trouble. If, on the other hand, a special guardian is appointed, and this officer acts according to the rules of the *lex rei sitæ*, and without coming to an understanding with the guardian of the domicile, the interest of the ward, instead of being furthered by the special guardianship, will be exposed to the greatest prejudice. No doubt there may exist circumstances which render it

expedient to appoint special guardians at the place where the property lies; but these officers must regulate their administration according to the laws which obtain at the ward's domicile' (*a*). In this view of the subject Savigny (*b*) concurs, and it is supported in regard to immoveables as well as moveables by many older jurists (*c*).

Have foreign guardians power over moveables in Scotland?

(2.) In regard to moveable property situated in Scotland, there is one old decision in which, where minors had curators appointed to them in England, the foreign guardians appear to have been recognised as having complete power over the Scotch estate without confirmation or reappointment (*d*). It is probably this case which Lord Kames had in view in the passage from his Principles of Equity referred to by Mr Justice Story (*e*). Our reports contain very few cases on the subject, probably because foreign guardians have found in practice little difficulty in collecting Scotch funds without judicial authority. Two cases, however, may be referred to in which the Court held factors appointed in Scotland responsible according to the laws of this country for the administration of funds situated in a foreign country (*f*). The converse would probably hold, and we should defer to the provisions of the *lex domicilii* in any question with regard to the administration of Scotch funds by foreign guardians (*g*). Probably, too, our courts would give full effect to the official title of foreign guardians, without insisting upon reappointment or formal confirmation. In matters of executry, our practice has been to recognise the nomination of executors in a foreign testament, but to require them to go through the form of taking out confirmation, at all events before they extract decree in any action raised by them to recover Scotch estate (*h*). It is otherwise in bankruptcy; and the practice of requiring foreign executors to take out confirmation before extract may be explained as a rule of

(*a*) Bar, pp. 371–2–3, s. 106.

(*b*) Savigny, System, vol. viii. s. 360, p. 117; s. 380, p. 341 *et seq.*

(*c*) Argentræus, Comm. de Minor, Glossa ii.; Hertius, de Coll. Leg. s. 4, No. 8; Boullenois, Obs. 4, p. 51; Obs. 39, p. 320; Merlin Repertoire, p. 412; Rodemburg, t. 2, c. 1; Bouhier, c. 24, s. 23. See also Gand, ss. 486, 488, 498.

(*d*) *Nasmith* v. *Nasmith* (1624), M. 4046.

(*e*) Story, s. 503.

(*f*) *Simpson* v. *M'Caul*, 1 Feb. 1855, 17 D. 314; *Accountant of Court* v. *Geddes*, 29 June 1858, 20 D. 1174.

(*g*) See *Findlater* v. *Dunmore and Co.*, reported under date 17 Jan. 1811, F. C.

(*h*) Story, s. 511, mistakes the statement of Lord Kames' opinion, Prin. of Equity, B. iii. c. 8, s. 3. See M'Laren on Trusts, i. p. 294, as to practice.

process, or from the supposed necessity of complying with statutory regulations for fiscal purposes (*a*). We recognise foreign commissions of bankruptcy; and without requiring further formalities, allow the Scotch moveable estate to be administered according to the *lex domicilii* (*b*). Mr Justice Story states that both in England and America 'no foreign guardian can, *virtute officii*, exercise any rights or powers or functions over the moveable property of his ward which is situated in a different state or country from that in which he has obtained his letters of guardianship' (*c*). The later practice of the English courts as to Scotch *curators bonis* seems not to require any new appointment of foreign guardians, and to hold the foreign title sufficient (*d*).

Powers of foreign guardians over Scottish heritage.

(3.) The decisions bearing upon the powers of foreign guardians over Scotch heritage are more numerous, but it is not yet settled whether or not our courts will recognise the *lex domicilii* of the ward's person, as regulating the administration of Scotch heritage.

The choice lies between the nearly universal practice of the Continent and the doctrines of English and American jurists. According to Mr Justice Story (*e*), 'there is no question whatsoever, that, according to the doctrine of the common law, the rights of foreign guardians are not admitted over immoveable property situate in other countries. These rights are deemed to be strictly territorial, and are not recognised as having any influence upon such property in other countries whose systems of jurisprudence embrace different regulations, and require different duties and arrangements.' The Scotch courts have never adopted his doctrine to this extent; but in regard to what he says as to the necessity for making special appointment of guardians to real estate, it will be seen that there are certain decisions in our reports which favour this view. 'No one,' Mr Story continues, 'has ever supposed that a guardian appointed in any one state of this Union had any right to receive the profits or to

(*a*) Legacy duty and succession duty are not due when the predecessor was not domiciled in this country; but it may be otherwise with probate or inventory duty.—*Thomson* v. *Adv.-Gen.*, 18 Feb. 1845, 4 Bell's App. p. 1; *Wallace and Others* v. *Att.-Gen.*, 1 L. R. Eq. p. 1.

(*b*) Bell's Com. 6th ed. pp. 1294–7; More's Notes, p. 7.

(*c*) Story, s. 504; Phillimore iv. 25, s. 553.

(*d*) *Scott* v. *Bentley*, 20 Feb. 1855, W. R. 280, 1 K. and J. 281; *Mathieson*, 26 June 1857, 19 D. 917.

(*e*) Story, s. 504; Burge Com. pp. 1005, 1006, 1009, 1010; Phillimore iv. c. 25, s. 554.

assume the possession of the real estate of the ward in any other state, without having received a due appointment from the proper tribunals of the state where it is situate. The case falls within the well-known principle, that rights to real property can be acquired, changed, and lost only according to the law *rei sitæ*.'

In *Young* v. *Thomson* (*a*), where it was held that an English guardian could not discharge a Scotch heritable debt, it seems, upon reference to the Session Papers, to have been assumed in argument that the English appointment was recognised as to Scotch heritage; and that the only question was, whether the English guardian had, according to the *lex domicilii*, the power to discharge a mortgage. As it was found by the opinion of English counsel that he had not this power, the Court refused him the like power in Scotland. This case is therefore to some extent an authority for holding that the Scotch courts will recognise the *lex domicilii* as regulating the administration of Scotch heritage. There are other cases which may be said to point in the same direction. In one, where Scotch minors had estates real and personal of considerable value in the island of Grenada, the Court refused to insert any limitation in their appointment of a *curator bonis*. This may seem to have assumed, that any local guardian appointed to the foreign estate would co-operate with the curator appointed in the Scotch domicile according to the *lex domicilii* (*b*). Our courts are in the practice of authorizing the guardians appointed by them to the Scotch heritage of foreign wards to pay a certain deference, for the ward's benefit, to the orders of the courts of the domicile regarding the administration of the estate. Thus, factors upon Scotch real estate belonging to English wards have been authorized to pay the income derived from heritable funds to the English guardians, but they were not permitted to transfer the principal sums recovered under heritable bonds to these guardians (*c*). The prohibition against removal of the principal sums in heritable bonds to England may be justified on the ground that this would deprive them of their heritable character, and so frustrate the Scotch laws of succession. The same consideration might apply in appropriate circumstances to prevent

(*a*) 8 July 1831, 9 S. 931.

(*b*) *Earl of Buchan* v. *Harvey*, 21 Dec. 1839, 2 D. 275.

(*c*) *Murray* v. *Baillie*, 24 Feb. 1849, 11 D. 710; *Allen* v. *Robertson*, 24 Nov. 1855, 18 D. 97.

the proceeds derived from the sale of Scotch heritable estate being removed out of the jurisdiction, so long as the incapacity of the ward to alter the legal succession to his estate exists. This consideration is, however, a specialty, and does not necessarily prove that our courts reject the *lex domicilii* as to the administration of Scotch heritage. They permit the administration and realization of Scotch heritable property under and in terms of the English bankruptcy statutes to all effects (*a*).

The practice in the Scottish courts has been for some time to appoint a special guardian to Scotch heritage belonging to foreign wards. The jurisdiction in the Scotch courts to make these appointments seems warranted *ratione bonorum.* As it has been hitherto a rule of practice in Scotland not to appoint any persons to be factors unless they are subject by their personal domicile to the Scottish courts, no cases have occurred in which foreign guardians have been reappointed here to Scotch heritage. On the Session Papers in the case of *Graham* v. *Hopeton* (*b*) in 1798, there is this manuscript note of the opinion of the Lord President: 'He was resident in England. Chancellor's commission would have no effect as to real estate here. This should have been stated to the Court, and a factor *loco tutoris* appointed.' This opinion has been followed in practice; but its grounds, and the rules to be followed by the Scotch factor in his administration, have never been fully discussed. Difficulty has been felt in practice as to the proper officer to be appointed by the Court in such cases. In some instances a *curator bonis* (*c*) or factor *loco tutoris* (*d*) has been appointed; while in others the guardian was a judicial factor, which seems the most appropriate appointment when the minor is not domiciled in Scotland (*e*). In one, a factor *loco tutoris et loco absentis* (*f*) was appointed, and in others the officer was a factor *loco absentis* (*g*). In one of the latest cases on the

(*a*) *Rattray* v. *White*, 8 March 1842, 4 D. 880; *Roy* v. *Campbell's Assignees*, 16 Nov. 1853, 16 D. 51; *Young* v. *Buckel*, 17 May 1864, ii. M. 1077.

(*b*) M. 5598.

(*c*) *Allen*, 24 Nov. 1855, 18 D. 97.

(*d*) *Wight*, 27 June 1837, 15 S. 1197; *Alford*, 19 Feb. 1851, 13 D. 950; *Melbourn*, 11 March 1857, 19 D. 699.

(*e*) *Lamb*, 11 March 1857, 19 D. 700.

(*f*) *Turnbull*, 22 Dec. 1838, 14 F. C. 388.

(*g*) *Maclean*, 29 Jan. 1834, 12 S. 355; *Hay*, 11 March 1837, 15 S. 850. As to the powers of a factor *loco absentis*, see *Kennedy* v. *Maclean*, 18 Feb. 1851, 13 D. 705.

subject, where the minor had been born in New Zealand, was resident in England, and had never been in Scotland at all, the Court had some difficulty as to the competency of appointing a *curator bonis*, although she was possessed of Scotch heritable property. Ultimately the Court, without delivering opinions, saw reason in the circumstances of the case to make the appointment (*a*). It may very well be that our courts hold a special appointment of guardians to Scotch heritage necessary to satisfy the forms of Scotch law; but certainly the cases in which these appointments have been made do not warrant the conclusion that the doctrine of Story is adopted, to the exclusion of the *lex domicilii*, in regulating the administration of the Scotch heritage. On the contrary, the case of *Lamb* (*b*) is a direct instance of the application of English law to this effect, and the cases generally are in accordance with the doctrine of J. Voet, upon which they are probably founded. That jurist holds the appointment of a foreign guardian valid everywhere as to the minor's whole estate; but he holds that the *judex rei sitæ* may appoint a special guardian to the immoveables in his jurisdiction. If no such appointment has been made, the same jurist holds that power of sale can be competently obtained from the *judex domicilii*, which will be effectual in the *locus rei sitæ*. If, on the other hand, a special guardian has been appointed, then he considers it safer that the application for powers should be made both in the domicile and in the *locus rei sitæ* (*c*).

Whether foreign guardian of a foreign lunatic will be recognised in Scotland.

VII. With regard to lunatics, it seems to have been the opinion of the Scotch judges in a case in 1749, misrepresented by foreign writers, who have taken their account of it from second-hand authorities (*d*), that although a person be regularly cognosced insane, and a person appointed guardian to him in a foreign country, such guardian will not be recognised in this country; he will have no title to pursue, no right to administer or manage the moveables or

(*a*) *Hay*, 16 July 1861, 23 D. 1291. See cases there referred to.

(*b*) *Lamb*, 20 July 1858, 20 D. 1323.

(*c*) Voet xxvi. 5, 5, xxvii. 9, 5. See also Bar, s. 106, p. 374.

(*d*) Story's Conflict of Laws, s. 499; Chambers on Infancy, p. 108. In the English case of *Johnstone* v. *Beattie*, 10 Clark and Fin. 42, the decision now to be stated was often referred to; but only the imperfect notes from reports of English lawyers could be produced, though it is reported by no less than three Scotch reporters, and admirably by one of them (Kilkerran).

the heritage, and the alleged lunatic will be considered sane until he is declared otherwise according to the forms of Scotch law.

George Morison, of London, being found in England a lunatic, a commission issued under the Great Seal constituting certain parties his committee. The committee instituted an action in the Court of Session in Scotland, for payment of a debt due to the lunatic, when they were met by the defence that they had no title to sue in Scotland, since the appointments of the Lord Chancellor are of no authority out of the Chancellor's jurisdiction, which no more extends to Scotland than it does to Germany. The Court of Session gave effect to this plea. They held that the verdict of the inquest in England could not be held to be proof in Scotland that the party here was a lunatic, nor could the tutors appointed to him by the Chancellor in England have any power in Scotland. 'By the law of Scotland,' says Kilkerran, 'the tutory of a lunatic, idiot, or furious person is in the nearest agnate, and failing him, a tutor is given in Exchequer; by the law of England it is in the Crown; and the Barons of Exchequer in Scotland, and the Chancellor in England, exercise the king's prerogative with equal authority, and none of them are subject to the orders of the other. Not to mention further, that possibly the same thing that would infer lunacy in England, might not infer idiotry or furiosity in Scotland. And, *lastly*, as it is *ex comitate* only, that the judicial proceedings of one country have any regard paid to them in another country; and that upon the case being stated by both parties by appointment of the Ordinary to the most noted lawyers in England, it was resolved that a verdict or retour in Scotland or elsewhere, finding a party lunatic, would be no evidence in any court in England, and that a guardian, appointed to such lunatic in Scotland or elsewhere, would not be entitled to carry on an action in England in behalf of the lunatic, nor to manage any estate belonging to him in England, so there can be no *comitas* that is not mutual, and *quod quisque juris*, etc. can on no occasion better apply.'

Such was the opinion of the Court of Session on the general question; and the parties founding upon the English appointment of guardians, suspecting, after the first debate in the case, that the title would not be sustained, procured a letter of attorney from the alleged lunatic, authorizing the suit to be carried on for him in the

Scotch courts. But the Court of Session refused to sustain this new title, because 'the letter of attorney proceeded on a narrative of his lunacy, and of the access given to him by order of the Chancellor (and without which the custodier of his person could not have given access to him), it was therefore *felo de se*, carrying along with it the evidence of its being void and null, as granted by an insane person.' This judgment was reversed upon appeal, not, however, upon the general ground of law, that guardianship in one country must be recognised in other countries,—a doctrine then decidedly rejected by the Court of Session, with the concurrence of the Lord Chancellor. 'The Chancellor,' says Elchies, 'thought the objections to the first suit well founded, *and that a committee in England could not sue in Scotland.*' The special ground on which the reversal proceeded is thus stated by Kilkerran: 'Had the process been originally brought in the name of Mr Morison (the lunatic) himself only, as it ought to have been, the defender could have had no objection, for the same reason that had prevailed with the Court below, to sustain the defence against the process brought at the instance of the commissioners (committee), that the lunacy in England could not be objected, as having no operation in Scotland; and as he was also pursuer, the using the name of the commissioners in the process could not vitiate the process at his own instance' (*a*).

In later cases, however, the Court have found, that the committee of a lunatic, appointed by the Court of Chancery in England, is entitled to sue for personal debts in this country. In the first case, the debt consisted of a personal bond, which the committee was found entitled to uplift. The point does not appear to have attracted much attention, and the opinion of the Lord Ordinary was thus expressed: 'As Mrs Rose herself (the lunatic), if of a sound mind, might have uplifted and discharged this sum, it follows that the committee of her person in England may do so likewise; being bound, however, to apply it agreeably to the powers conferred upon him by the Court of Chancery' (*b*). The point was more directly brought before the Court in the next case, when they

(*a*) *Morison* v. *Sutherland*, M. 4595, and Elch. *v.* Idiotry 2 (1749); H. of L. 13 Feb. 1750, 1 Pat. App. 454. See also Kames' Eq. iii. c. 8, s. 1, p. 325. In the older English cases the same principles were applied.—*Houston*, 1 Russ. 312; *Otto* v. *Lewis*, 1 Ves. 298; *Da Costa*, 8 Ves. 316.

(*b*) *Rose* v. *Grant*, 9 June 1835, 7 Jur. 403.

found the committee entitled to pursue a personal action in this country (*a*). In this case the English guardian had inserted in his summons a conclusion for adjudication in security of an annuity due to the ward, and in terms of an obligation contained in a bond of annuity granted by the defender, who was the ward's husband. Without deciding that it was incompetent for a foreign guardian in this way to affect real estate in this country, the Court intimated their doubts so strongly that the conclusion for adjudication was withdrawn. When a Scotch *curator bonis* has been appointed to the heritage of an English lunatic, the Court has authorized his payment of income derived from real estate to the English committee (*b*), in terms of directions by the *judex domicilii.*

The tendency of the later cases in our courts seems to be to place guardians of lunatics in the same position as guardians of minors, and indeed no valid distinction in principle can be drawn between them. The appointment of a foreign guardian in lunacy will apparently be received as *prima facie* evidence of the ward's mental state, and consequent legal incapacity. His moveable estate will be left freely to the management of his guardian, without a new appointment according to Scotch forms. A special guardian will probably be appointed to Scotch heritage according to the practice in cases of minority (*c*). But in regard to the administration of guardians for lunatics, as well as that of guardians for minors, the question is yet undecided whether the *lex domicilii* will be recognised as the law to which the guardian is bound to conform, in his dealings with property situated in this country belonging to a ward having a foreign domicile. The decision of this question may have an important bearing upon the extent and nature of the responsibility of guardians, which depends generally upon the law of the country in which they are appointed. If Scotch guardians appointed to a Scotch ward are competent to the administration of his estates real and personal abroad, the Court will of course look for the exercise of due care in their doing so. The special guardians appointed to the Scotch heritage of foreign wards

Is the guardian of foreign lunatic bound to conform to *lex domicilii*, or the law of Scotland?

(*a*) *Gordon* v. *Stair*, 8 July 1835, 13 S. 1073.

(*b*) See *Murray* v. *Baillie*, *supra*; *Laing* v. *Robertson*, 21 June 1859, 21 D. 1011.

(*c*) See *Leith* v. *Hay*, 17 Jan. 1811, F. C.

will necessarily have different duties and responsibilities according as their administration is to be regulated exclusively by Scotch law or by the *lex domicilii.*

The civil law of guardianship where property of ward situated in different provinces.

According to the civil law, while guardianship was a *munus publicum* not to be refused when tendered, except on certain grounds, no one was obliged to take charge of property in another province, or more than 100 miles distant from his residence (*a*). This rule rendered it common to constitute special guardianships for parts of the estate situated in different localities. This division of the estate among several guardians might take place either by testament (*b*) or by the direction of the magistrates in appointing tutors or curators dative (*c*). Each local guardian in either case had full powers (*d*); and the rule of responsibility was, that each answered for his own local intromissions and management, and not *in solidum* for his colleagues elsewhere, unless they had been guilty of some gross fault or mismanagement which distinctly called for his interference on behalf of the ward, and he had neglected to interpose (*e*). If the division of the administration was merely an unauthorized arrangement of the guardians *inter se*, they each remained liable for the whole.

The forum to which guardians are amenable.

These rules of the civil law may throw some light on the extent and nature of the responsibility of the guardians in the domicile of the ward, and of the special guardians of the *rei situs.* As regards the mere forum where any of these guardians may be sued, there is not much difficulty. Apart from the personal forum of guardians, the courts which have jurisdiction over them are those of the place of appointment, and those of the country where the estate under their charge is corporeally situated. Our courts have enforced the provisions of foreign settlements as to foreign estate real and personal where the trustees or executors were personally subject to their jurisdiction (*f*). But in such cases where the guardianship or trusteeship is not Scotch, the law to which the office belongs must necessarily be applied. Hence, while the jurisdiction in the *locus rei sitæ* is undoubted (*g*), our courts may refuse to exercise it in

(*a*) D. xxvii. 1, 21, s. 2.
(*b*) D. xxvi. 2, 15.
(*c*) D. xxvi. 5, 27.
(*d*) C. v. 59, 5.
(*e*) C. v. 52, 2; also C. v. 38, 2.
(*f*) *Robertson* v. *Brodie*, 2 Dec. 1843, 6 D. 170; *Sinclair and Others* v. *Alexander*, 18 Dec. 1851, 14 D. 217.
(*g*) *Douglas, Heron, and Co.* v. *Grant's Trs.*, 3 Pat. App. 503.

view of the necessity for applying the law of the place of appointment, and of the inconvenience thence arising (*a*). The place of appointment is generally the proper official forum, in preference to the personal forum of the trustees or guardians, and the forum *rei sitæ* (*b*). For an instance in which Scotland as the place of the administration of a charitable trust under a foreign settlement was held to fix the law of the administration, reference may be made to a recent decision (*c*).

(*a*) *Roy* v. *Campbell's Assignee*, 16 Nov. 1853, 16 D. 51.

(*b*) *Cruikshank* v. *Cruikshank's Trs.*, 24 Feb. 1843, 5 D. 733.

(*c*) *Ferguson* v. *Marjoribanks*, 1 April 1853, 15 D. 637.

APPENDIX.

THE Appendix to the first edition of this work contained Styles of Petition to the Court, and other forms relative to the appointment of factors and curators and other guardians, and also as to the administration of estates in the hands of guardians. It was my intention to have reprinted these or similar styles in this edition; and various references will be found in the preceding pages to forms to be found in this Appendix. Upon reconsideration, however, it has occurred to me that the space which would be so occupied, would be better filled with the following statutes, which are the principal statutes on the law of guardianship. There is nothing peculiar or difficult in the petitions to the Court for appointments of factors, or for special powers; and there is no necessity for encumbering this work, therefore, with styles of petitions which are found in every lawyer's office.

The case referred to at p. 347 (*e*), as not being reported when that page was going through the press, is *Robertson*, petitioner, June 1865.

P. F.

STATUTES.

1474, c. 51.—*Of ane Tutor and his Age.*

ITEM, It is statute and ordained anent the briefe of Tutorie, that it be understanding in time cumming, that he that is nearest Agnat, and of twentie five zeires of age, fulfilling the lave of the poyntes of the briefe, sall be lauchfull tutour, suppose the childe that happenis to be in tutorie, have ane zounger brother or sister, Notwithstanding that the agnat is not immediat to succede to the childe, because of zounger Brother and sisters.

1475, c. 66.—*Anent the brieve of Idiotrie and furiositie.*

ITEM, It is statute & ordained, that sen there is a brieve of our Soverain Lordis Chapel maid and ordained for the safetie of alienation of Lordes and Barronnes landes, throw idiotes and natural fules, furious and wood-men the time of their folly, the quhilkis brieves savis not the alienation, bot allanerly fra the time of the serving of the saidis brieves, and

remeids it not, that is done of before, in case it be done in the time of the folly or furiositie, albeit he be als great a fule and furious before, as after: It is statute and ordained therefore in time to cum, the said brieve be reformed, & an clause put theirin, to inquire of the foly & furiositie, and how lang time he was of thay conditions. And fra it be knawin be the inquest, that the persones be fules or furious, the time thereof, the alienation maid be him, after the time that the inquest findis that he was outher fule or furious, sall be of nane availe, bot retreated and brocht againe till him, alsweil as the alienation maid after the serving of the said brieve.

1555, c. 35.—*Anent the ordour for giving of curatoures to Minors.*

ITEM, Because it is understandin, that be the giving of curatoures to Minores bee sindrie Judges, there hes bene great skaith susteined be the saidis Minores: Therefore it is statute and ordained, that in all times cumming, quhen onie Minor passis the zeires of his Tutorie, and desiris Curatoures: That he cum before his judge Ordinar, and desire of him ane summounds or edict, to warne twa, at the least, of the maist honest and famous of the Minor's kin, and all uthers havand interesse, quhilk sall be warned lauchfullie: That is to say, the special persones personallie, or at their dwelling places, givand ane copie to their wives or servandes, or affixand it on their zettes or dures, and uthers havand interesse generallie at the mercat croce of the head Burgh of the Schire, quhair the saidis Minores hes their landes or gudes, to compeir at ane certaine daye, upon nine dayes warning at the least, to heare and see the Curatoures desired be the said Minor, to be given to him unto his perfite age of twentie ane zeires, and caution foundin, *de fideli administratione*, quhilkis beand given in maner foresaide, they sall not be revoked nor dischargeit, nor uthers chosen to the Minor, unto the time they be called before the Lordes of Councel, or uthers judges Ordinar, at the will of the bairne, to heare and see them discharged, and revoked for reasonable causes: Quhilkis being foundin of veritie, they then to be discharged, and uthers curatoures given in their places be the ordour foresaid, with caution, and na uther-wise.

1585, c. 18.—*The narrest Agnat suld be curatour to Fooles, Idiotes and furious Persones.*

OUR SOVERAINE LORD be advise of this present Parliament statutis and ordainis that the narrest agnates and kinsmen of natural Fooles, Idiotes and furious persones sall be served, received and preferred according to the dispositions of the commoun law to their tutorie and curatorie.

1663, c. 10.—*Act in favours of Minors, anent the duties of the Lands comprised from them.*

OUR SOVERAIGN LORD considering, the favourable condition of Minors, who are oftentimes destitute of Tutors and Curators; and though they

have them, yet in respect of their minority, they are not in capacity or credit to raise sums of money for satisfaction of their creditors: And it being unreasonable, that their Creditors comprisers of their Estate, should, during the not expiring of the legal reversion, which, according to Law continues during their minority, have more advantage by their Estate then corresponds to the Annual-rent of the true sums owing to them by vertue of their comprisings; Doth, with advice and consent of his Estates of Parliament, Ratifie and approve the Act of Parliament, made in *August* one thousand, six hundered, and twenty-one, *Cap.* 6. in so far as the same concerns Minors; And Declares, that the true meaning thereof was, and is, that Minors, having right to the Legal reversion, should be no further obliged during their minority of twenty one years of age, but allanerly for the Annual-rent of the sums contained in the comprisings; and that they lose not the right of the *superplus* of the mailes and duties of the Lands, so far as the same exceeds the said Annual-rents, during their said minority.

1672, c. 2.—*Act concerning Pupils and Minors, and their Tutors and Curators.*

Our Soveraign Lord, Considering the great prejudice and inconvenience befalling to Pupils and others, who cannot provide for, or defend themselves, That their Tutors or Curators have immediate access to their Charter-chests, Writs, Evidents and Securities of their Lands, sums of money, and others belonging to them, which they may imbezle, suppress, or by collusion, give up to their Debitors or other parties interessed, without just satisfaction; Or otherwise, having gotten satisfaction, there is no mean by which a Charge can be made up against the saids Tutors and Curators, but themselves, when they are brought to an account, make both their own Charge and Discharge; and in case of their decease, they who succeed to them, for the most part, can have no Charge made up against them at all. For remeed whereof, His Majesty, with advice and consent of His Estates of Parliament, Statutes, Ordains and Declares, that no Tutor or Curator of any Pupil, Minor, Idiot or furious person, to be named or designed in any time coming, or who is not actually stated and entered in the said office, shall have power or authority to exercise the said Office of Tutor or Curator, or to meddle with the Writs, Evidents, Means and Estate of the saids Pupils, Minors, Idiots or furious persons, until first an Inventar be made up, in manner after-specified, by the saids Tutors and Curators, with advice and consent of the nearest of kin on the fathers side, and the nearest of kin on the Mothers side, who shall be Majors, and within the Kingdom for the time: Which Inventar shall be subscribed by the saids Tutors and Curators, and the saids nearest of kin; and one subscribed double thereof keeped by the saids Tutors or Curators, another by the nearest of kin on the Fathers side, and the third by the nearest of kin on the Mothers side. All which subscribed Duplicats shall be judicially produced before the Judge ordinar of the place, where the Pupil, Minor, Idiot, or furious person their chief residence is, and an Act

made upon production thereof, bearing the production of the Inventar, and expressing the names of the persons subscribers thereof, and in whose custody the same are left; and that the Duplicats be also subscribed by the Clerk of Court, that they may not be altered thereafter. And in case the nearest of kin on both sides will not concur in making up the Inventar in manner foresaid, the saids Tutors and Curators shall raise summonds at their instance, before the saids Judges ordinar *respective*, for summonding the nearest of kin that are majors, and within the Countrey, upon either side, for decerning them to concur in making up of the said Inventar in manner foresaid: And in case they compear not, or do not concur as said is, With certification, the said Inventar shall be made up by the said Tutor or Curator, with advice and consent of the Judge Ordinar, or any whom he shall delegate or appoint, who shall subscribe three Duplicats of the said Inventar with the saids Tutors or Curators, whereupon a Judicial Act shall be made, and the Duplicats subscribed by the Clerk, in the same manner as if the nearest of kin had concurred; and a Duplicat thereof shall be keeped by the saids Tutors and Curators, and the other two Duplicats shall remain in the Clerks hands, to be delivered to the nearest of kin on the Father and Mothers side, being closed up and sealed by the saids Tutors or Curators, and the person delegate for making the said Inventar as said is, Which Inventar shall contain the names and designations of the Lands belonging to the Pupils, Minors and others foresaids, and the Bands, Counts and Tickets due to them, and sums therein contained, and their Moveables, as well Heirship-Moveable as other Moveables: And in case that thereafter any other Lands, Debts, sums of money or other Goods and Gear whatsoever belonging, or that may happen to belong to the saids Pupils, Minors, Idiots, or furious persons, shall come to the knowledge of the saids Tutors or Curators, so that they may attain to the possession thereof; In that case, and within the space of two Moneths after they attain to the possession of the samine, They shall eike the same to the foresaid Inventar, and make a judicial Act thereupon in the hands of the Clerk of Court where the principal Inventar was made, and shall leave two Duplicats of the said Eik or Eiks, one or moe, sealed as said is, in the hands of the said Clerk, for the use of the nearest of kin as said is. And it is hereby further Declared, that the Debitors of the Pupils, Minors, Idiots or furious persons, shall not be obliged to make payment to the Tutors or Curators of the saids persons, of any sums due by them, unless the said Tutor or Curator show to the saids Debitors, that the Sums or Goods demanded from them, are contained in the saids Inventars or Eeks subscribed by the saids nearest of kin, or by the Clerk of Court in maner *respective* foresaid. And it is hereby further Declared, that if the saids Tutors or Curators shall failzie in making up the saids Inventars and Eiks in manner above-written, They shall be lyable both for intromission and Omission, and shall have no allowance or defalcation of the charges and expenses wared out by them in the affairs of the saids Pupils, Minors, Idiots or furious persons: and shall be removable from their Office as suspect Tutors and Curators, if they fail in making up the Eiks from time to time in manner foresaid. It is alwayes hereby Declared, that this Act

shall not prejudge Pupils, Minors and other persons aforesaid, to charge their Tutors or Curators with what it can be made appear they have intrometted, or might have intrometted with, over and above what is contained in the Inventar. And further His Majesty, with advice and consent foresaid, Statutes and Ordains, That all Gifts of Tutory, that shall be granted hereafter, by His Majesty or His Exchequer, shall proceed upon citation of the Minors nearest of kin on both sides, at the instance of the Cravers of the saids Gifts: That they may be heard, if they have any thing to say against the person to whom the Gift is to be granted; or, upon consent first obtained thereto, under the hands of the said nearest of kin. And Ordains, that the said Gifts shall bear expressly that the nearest of kin were cited, or consented to the passing of the said Gifts: Certifying all who shall procure Gifts of Tutory or Curatory foresaids, without citation or consent of the saids nearest of kin, or where the samin is not expresly mentioned therein, That these Gifts shall be declared null and void, by way of exception or action, at the instance of any person who shall obtaine a Gift of the saids Tutory or Curatory, conform to the Tenor of this present Act.

1696, c. 8.—*Act anent the Nomination of Tutors and Curators.*

Our Soveraign Lord and the Estates of Parliament Considering that Tutors nominat by a father to his Children are persons in whom he reposeth the greatest trust and that the tutors nominat frequently decline the office being unwilling to subject themselves to the hazards of Omissions of being oblidged in solidum each of them for others And likewayes Considering that the father can make a better choise of Curators for his Children who are minors than the minors could make for themselves Therfor His Majestie with advice and consent of the Estates of Parliament Statutes and Ordains that it is and shall be lawfull for the father by ane act or deed in his leige poustie to make a nomination of such Persons as he thinks fit to be tutors and of such Persons as he thinks fit to be Curators to his Children dureing their Minority Containing this Provision and Quality That the saids Tutors or Curators shall not be lyable for Omissions but for their actual intromissions with the means and estate descending from the father and other deeds of administration thereanent And that each of them shall only be lyable for himselfe and not in solidum for others And it is hereby Statute and ordained That the Tutors or Curators so nominat, shall not be lyable for Omissions but only for their actual intromissions with the means and estate descending from the father and other deeds of administration thereanent and that each of them shall only be lyable for himself and not in solidum for others And that the Curators named by the father accepting befor the Judge ordinary in the terms of their nomination shall have right to exerce the office dureing all the years of the minority; And it is hereby Declared that where the same Persons are named by the father to be both Tutors and Curators it shall be lawfull and free for those who shall accept and exerce the office of Tutory to decline and accept as Curators after the Pupillarity expires

as they think fit Declaring allwayes that if the condition of any of the Tutors or Curators to be named with the qualities aspeit shall change and become such as any near relation to the pupil or minor shall think fit to represent the same to the Lords of Session to the end after mentioned Then and in that case the saids Lords are hereby empowered upon the said Complaint and a Citation upon it without abideing the order of the Roll to ordain the forsaid Tutor and Curator upon such reasons as they shall find probable either to find good and sufficient Caution for their administration, or to remove, and if He refuse to Remove him And lastly Provyding That nothing in this act shall liberat from or dispense with the makeing of Inventars.

1696, c. 9.—*Act of Prescription anent Tutors and Curators accompts.*

Our Soveraign Lord and the Estates of Parliament considering the great danger and hazard to which Tutors and Curators are exposed by being subject to Compt and Reckonings to their Pupills and minors unless secured by the prescription of fourty years after the majority of the saids Pupills and minors Therfor His Majesty with the advice and consent of the Estates of Parliament Statutes and Ordains that all actions of Compt and Reckoning competent to pupills and minors against their Tutors and Curators for makeing their accompts not persued and insisted in within the space of ten years after the majority of the saids pupills and minors or after their death they dying in their minority shall after that time prescribe for ever And the saids Tutors and Curators and their Successors shall be als fully Exonerat and Liberat as if the saids Pupills and Minors after their majority had fully and amply Discharged the same And declares that the contrary action at the instance of Tutors and Curators against their Pupills and minors shall prescribe in the same manner within ten years Declareing allwayes That this Prescription shall not run against minors as also that all the forsaid actions already Raised or competent to be Raised by either of the saids Parties hinc inde shall in like manner Prescribe within ten years after the date of this act.

ACT OF PARLIAMENT

FOR THE

Better Protection of the Property of Pupils, absent Persons, and Persons under Mental Incapacity in Scotland.—12 & 13 *Vict. c.* 51.—[28*th July* 1849.]

Whereas an Act of Sederunt was passed by the Court of Session in *Scotland* on the thirteenth day of February one thousand seven hundred and thirty, setting forth that the Court had often been applied to for appointing factors on the estates of pupils not having tutors, and of persons

absent who had not sufficiently empowered persons to act for them, or who were under some incapacity for the time to manage their own estates, to the end that the estates of such pupils or persons might not suffer in the meantime, but be preserved for the behoof of such persons and all having right therein, and therefore establishing certain regulations in regard to the conduct of such judicial factors, which regulations are still in force: And whereas the applications to the Court of Session for the appointment of such factors have become very numerous; and it has been found that the existing regulations and the present means of enforcing them are imperfect and insufficient for preventing in many instances the occurrence of great irregularity in the conduct of such factors, and in consequence thereof great loss has resulted to the funds and estates under their charge and to the parties interested therein; and it has therefore become necessary to make further provision on that behalf: And whereas it is also expedient to make provision for the more regular accounting and official management of persons who shall hereafter be served as tutor of law, or appointed as tutor-dative to any pupil, or be served as curator or appointed as tutor-dative to any insane person or idiot: May it therefore please your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; (that is to say,) the expression 'judicial factor' or 'factor' shall mean factor loco tutoris, factor loco absentis, and curator bonis; the word 'tutor' shall mean any person who after the passing of this Act shall be served tutor of law to any pupil, or be appointed tutor-dative to any pupil or insane person or idiot; the word 'curator' shall mean any person who after the passing of this Act shall be served as curator to any insane person or idiot; the word 'accountant' shall mean the accountant of the Court of Session, to be appointed under the authority of this Act; the expression 'Lord Ordinary' shall mean the Lord Ordinary of the Court of Session discharging the duties of junior Lord Ordinary in time of session, and the Lord Ordinary on the Bills in the time of vacation; the expression 'Court of Session' or 'Court' shall, excepting as to the power of passing acts of sederunt, mean either division of the Court of Session; the word 'estate' shall include all property and funds, and all rights heritable and moveable; the word 'lands' shall include all heritable subjects; words used in the singular number shall be held to include several persons or things, and words importing the masculine gender shall extend and be applied to females as well as males.

Interpretation of terms in this Act.

II. And be it enacted, That every judicial factor shall, within such time after his appointment as the Court shall direct, find caution for his duly accounting for his intromissions and management, and observing and performing every duty incumbent upon him as factor, in terms of the rules prescribed or to be prescribed for the discharge of his office, and in case of his failure to do so his appointment shall fall; and no factor shall

Judicial factor to find caution for duly performing his duties.

enter upon the duties of his office, nor shall an extract of his appointment be issued, until after such caution is found and received as sufficient; and the factor shall extract his appointment without delay.

Judicial factor to lodge with the accountant a distinct rental of lands committed to his management, a list of funds, and an inventory of moveables, etc.

III. And be it enacted, That every judicial factor shall, as soon as may be after extracting his appointment, and within six months at latest from the date on which his bond of caution shall have been received, lodge with the accountant a distinct rental of all lands committed to his management, specifying the rents, revenues, and profits of such lands, the existing leases, and other rights affecting the lands, and the public burdens and other burdens thereon, and a list of all monies and funds belonging and debts due to the estate, specifying the particulars of each item, and the interest or revenue arising from the same, the document by which the same is vouched, and the nature and value of any security held for the same, and also an inventory of any household furniture, farm stocking, goods, or moveables, including rights moveable, forming part of the estate; and he shall, without delay after extracting his appointment, recover all writs and documents of importance belonging to the estate, and collect all monies due to the same not securely invested, and use all reasonable diligence in ascertaining the exact nature and amount of the estate placed under his charge; and he shall produce all such writs and documents, and information so obtained by him, along with the said rental, list of funds, and inventory, to the accountant, which rental, list, and inventory, when adjusted and approved of by the accountant, shall be signed by him and the factor, and shall form a ground of charge against the factor; and if at any time thereafter any new claims or property belonging to the estate shall be discovered, the factor shall report the same in his next account of charge and discharge to the accountant, who shall make such alteration on the rental, list, and inventory, as may be thereby rendered necessary.

Factor to close his accounts once a year, and lodge the same with accountant.

IV. And be it enacted, That the factor shall close his account of charge and discharge once in every year, on a day to be fixed by the accountant, and within one month thereafter shall lodge such account in the office of the accountant, with the vouchers numbered (*a*), and referred to in the account by number: Provided always, that it shall be competent for the accountant, on cause shown, to prorogate the time for lodging such accounts and vouchers, but in no case shall such prorogation extend beyond three months from the day fixed for the closing of the accounts.

Factor to lodge monies in one of the banks of Scotland.

V. And be it enacted, That the factor shall lodge the money in his hands in some one of the banks in *Scotland* established by Act of Parliament or Royal Charter, in a separate account or on deposit, such account or deposit being in his own name as judicial factor on the estate; and if the factor shall keep in his hands more than fifty pounds of money belonging to the estate for more than ten days, he shall be charged with a sum to the estate at the rate of twenty pounds *per centum per annum* on the excess of the said sum of fifty pounds, for such time as it shall be in his hands beyond the said ten days; and, unless the money has been

(*a*) The lodging of separate inventories of vouchers, and of duplicates of factorial inventories and accounts, is dispensed with by A. S. 11 Mar. 1851.

so kept from innocent causes, the factor shall be dismissed from his office, and shall have no claim for commission.

Penalties on factor for misconduct.

VI. And be it enacted, That if the factor shall misconduct himself, or fail in the discharge of his duty, he shall be liable to such fine, and to the forfeiture of the whole or any part of his commission, and to suspension or removal from his office as factor, and to payment of expenses, or to any one or more of such penalties, as the Court in its discretion shall decide; and that over and above such further liability as he may be subject to, as accords of law, in reparation of any loss or damage sustained by the estate in consequence of such misconduct or failure.

Factor may apply for special powers.

VII. And be it enacted, That if at any time it shall appear to the factor that there is a strong expediency for granting abatement of rent, either temporarily or permanently, or for renewing or granting a lease for a period of years, or for draining, or for erecting buildings or fences, or for otherwise improving the estate in a manner not coming within the ordinary course of factorial management, he shall report the same to the accountant, who may order any necessary inquiry, and shall state his opinion thereon in writing; and such report and opinion may be submitted by the factor to the Lord Ordinary, with a note praying for the sanction of the Court to the measure proposed; and the Lord Ordinary shall, with or without further inquiry, report the matter to the Court, who, if they consider it expedient and consistent with due regard to the amount of the estate at the time, may sanction the measure, and the decision of the Court shall be final, and not subject to appeal; and if the estate be held under entail, it shall be lawful to the Court to authorize the factor to take proceedings for constituting as a charge against the future heirs of entail, or otherwise recovering, the money expended in making any improvements upon the estate, under and in terms of an Act passed in the tenth year of the reign of his Majesty King *George* the Third, intituled *An Act to encourage the Improvement of Lands, Tenements, and Hereditaments in that Part of* Great Britain *called* Scotland, *held under settlements of strict entail*, and under and in terms of an Act passed in the Session of Parliament holden in the eleventh and twelfth years of the reign of her present Majesty, intituled *An Act for the Amendment of the Law of Entail in* Scotland; but nothing herein contained shall be held as conferring power on the Court to authorize the factor to build or enlarge a mansion-house upon the estate, or to charge the estate and future heirs of entail to a greater extent than one-half the amount with which the heir in possession, if under no incapacity to act, could have charged the estate under the said Acts, or either of them; and if any factor having charge of the estate of any lunatic or other person incapable of managing his own affairs shall deem it proper for the comfort or welfare of such person that the whole or a part of such estate should be sunk on annuity, he shall report the matter to the accountant, who shall state his opinion thereon in writing, and such report and opinion shall be submitted by the factor, with a note as aforesaid, to the Lord Ordinary, who shall report the matter to the Court, and it shall be in the power of the Court to sanction the measure, and the decision of the Court shall be final, and not subject to appeal; and in all other matters in which special powers

10 Geo. 3. c. 51.

11 and 12 Vict. c. 36.

are, according to the existing practice, in use to be granted by the Court, the Court shall have power to grant the same in like manner and form as is above provided.

Before special powers, etc., granted, Court to order such intimation to be made as may be deemed proper.

VIII. And be it enacted, That in all cases in which application shall be made to the Lord Ordinary or the Court by any factor, or other person having right to make the same, for special powers, or for the extraordinary application of money or funds or property belonging to any estate, the Lord Ordinary or Court shall order such intimation to be made as may be deemed proper.

Power to appoint accountant.

IX. And be it enacted, That it shall be lawful for her Majesty and her heirs and successors to appoint a person versant in law and accounts, to be called the Accountant of the Court of Session, for performing the duties of that office, with such yearly salary, not exceeding six hundred pounds, payable quarterly out of the fee-fund established by this Act, and with such accommodation of office room, or reasonable allowance for the same out of the said fund, as may be fixed by the Commissioners of her Majesty's Treasury, or any three or more of them, but such salary shall always be restricted, so as not to exceed the clear existing proceeds of the aforesaid fee-fund, after deducting all other charges thereon; and the accountant shall be allowed two clerks, whom he shall appoint, with a salary not exceeding two hundred pounds yearly for the first, and one hundred and fifty pounds yearly for the second, which salaries shall also be paid quarterly out of the said fee-fund; and the accountant shall hold no other official situation in the Court, and shall not, directly or indirectly, by himself or any partner, be engaged in practice; and he shall not directly or indirectly have any management of or intromission with any money of any estate under charge of the Court; provided always, that it shall be competent for the Court or for any Lord Ordinary to remit to the accountant to examine and report in regard to any matter depending before the Court or such Lord Ordinary, not connected with his official duties, and in which it shall appear to the Court or such Lord Ordinary that the report of an accountant should be obtained, and for such business the accountant shall be entitled to reasonable remuneration.

General nature of accountant's duty;

X. And be it enacted, That the accountant shall superintend generally the conduct of all judicial factors and tutors and curators coming under the provisions of this Act already appointed or to be hereafter appointed, and shall see that they duly observe all rules and regulations affecting them for the time.

to assign a day for closing first account;

XI. And be it enacted, That on the factor's bond of caution being received as sufficient, it shall be transmitted by the clerk to the process to the accountant, who shall forthwith give a written intimation, dated and signed, to the factor or his agent, stating that the bond has been received, and assigning the day on which the factor is to close his first account, being not less than six nor more than eighteen months from the date of such intimation; and on the death or insolvency of the cautioner of any factor, such factor shall forthwith give notice in writing to the accountant of such death or insolvency, and the accountant shall, as soon as the fact shall come to his knowledge, by means of such notice or otherwise, require new caution to be found.

XII. And be it enacted, That the accountant shall see that the factor lodges a rental, list, and inventory in terms of this Act, and shall, along with the factor or his agent, examine, verify, and adjust, and with the factor sign the same, and shall ascertain the circumstances of the estate, and call for all necessary documents, so as to form a clear rule of charge against the factor at the commencement of his office, and the accountant shall retain such rental, list, and inventory.

to adjust the rental, list, and inventory;

XIII. And be it enacted, That the accountant shall see that the factor's accounts of charge and discharge, with the vouchers thereof, are duly lodged, and shall thereafter examine the same without undue delay, and audit the account on the general principles of good ordinary management for the real benefit of the estate and of those interested therein, and he shall consider the investments of the estate and the sufficiency thereof, and he shall be entitled to require from the factor all necessary information and evidence, and he shall fix the amount of the factor's commission for the period embraced by the audit, according to his opinion of what is just in each particular case, and he shall strike the balance, and shall state the result of his audit in the form of a short report; and if he has made any corrections on the account, he shall, if required by the factor, explain such corrections and his reasons for making them.

and to audit the accounts.

XIV. And be it enacted, That the accountant shall have power, upon report to and with the approval of the Lord Ordinary, where the sum involved exceeds twenty pounds, and without such report and approval where the sum involved is less than twenty pounds, to dispense with the rules of exact diligence in any matter of factorial management.

Rules of exact diligence may be dispensed with.

XV. And be it enacted, That the accountant's audit and report shall be conclusive against the factor and his cautioner if written objections shall not be lodged by the factor with the accountant within twenty days from the date of such audit and report being communicated to the factor; but if objections be lodged, the accountant shall consider the same, and may alter his report if he see cause; and unless the objections are allowed or departed from, the account and report and whole proceedings shall be transmitted by the accountant to the Lord Ordinary, who shall call the factor or his agent, and if necessary the accountant, before him at chambers in reference thereto, and the Lord Ordinary or the Court, if the matter shall be reported or brought under review, may affirm, vary, or reverse the audit and report of the accountant, and may reserve any question or questions which are raised in the objections for the factor till the final audit of his accounts, directing the account to be balanced for the present, as the Lord Ordinary or the Court may think expedient and just; and no judgment of the Lord Ordinary, pronounced as aforesaid, shall be subject to review at the instance of the accountant, nor, in case the Lord Ordinary shall reserve any question as aforesaid, shall it be competent to the factor to reclaim against such reservation; but in case the Lord Ordinary shall decide against the factor, he may bring the interlocutor under review of the Court, by a short note of appeal from the Lord Ordinary's judgment, and the judgment of the Court shall not be subject to appeal at this stage nor till the termination of the factory, without the leave of the Court: Provided always, with reference to such

Accountant's report conclusive against factor if not objected to, and if objections, how to be disposed of.

discussion between the accountant and the factor, that at the audit of the factor's accounts, at the termination of his factory, it shall be competent to the factor and his representatives, or to any succeeding factor, or to any parties beneficially interested in the estate, to enter upon such matter of objection, if the same has been reserved, but if the same has been decided by the Lord Ordinary or the Court, the decision shall not be opened up except upon cause shown; and the factor shall not be entitled to charge the expense of any such proceedings against the estate without the special authority of the Lord Ordinary or the Court.

Cautioner may be heard before the accountant.

XVI. And be it enacted, That it shall be lawful for the cautioner to appear and be heard before the accountant during the course of the audit, or to state objections to the audit within twenty days from the date of the report being intimated to the factor as aforesaid, unless the accountant shall grant further time, not exceeding six weeks; and for the purpose of stating such objections the accountant shall, if required, furnish to the cautioner a copy of his report, and the expense of such copy, and of any discussion that shall take place during or after the audit at the instance of the cautioner, shall be borne by the cautioner, and not by the estate: Provided always, that no objection stated on the part of the cautioner shall be any ground for delaying any consignation of any balance ordered by the accountant, or otherwise giving immediate effect to the audit.

Parties interested may, upon cause shown, open up audit of accounts.

XVII. And be it enacted, That, either at the termination of the factory or during its subsistence, it shall be competent for any party beneficially interested in the estate, or for any succeeding factor, to make appearance, and upon cause shown to open up the audit of all accounts which have been audited by the accountant in absence of such party or succeeding factor, and also all questions in the accounting which have either not been submitted to the decision of the Lord Ordinary or the Court, or been reserved, and also all questions which have been decided merely as between the accountant and the factor, or between the factor and some other beneficiary, reserving always to the factor and his representatives their answers and defences as accords of law; but if such party or succeeding factor shall so appear, and such questions shall be opened up and decided, the judgment, if pronounced between the factor and a party beneficially interested, shall be final and conclusive as between them and their representatives, and if pronounced between the factor and succeeding factor, shall be final and conclusive against the factor and the estate.

Accountant to make an annual report of all judicial factories, which shall be printed.

XVIII. And be it enacted, That the accountant shall make an annual report to the Court of Session, containing such particulars as he may think fit, or as the Court may by Act of Sederunt or otherwise require, of all judicial factories, whether granted before or after the passing of this Act, then subsisting or remaining unsettled, and of his own proceedings in reference to the same, and such annual report shall be printed at the cost of the fee-fund established by this Act.

Accountant to make requisitions and orders on the factor;

XIX. And be it enacted, That the accountant shall make all such requisitions or orders on the factor as he may consider necessary; and if such requisition or order shall be disobeyed or neglected, he shall report the same to the Lord Ordinary, giving previous notice to the factor or his

agent, who shall lodge objections in writing, if he any has, within forty-eight hours after such notice; and the Lord Ordinary is hereby empowered, on considering such requisition or order, with the objections thereto, if any, to recal or vary, confirm or repeat such requisition or order; and the interlocutor of the Lord Ordinary shall be final and conclusive against the accountant, and also against the factor, unless he shall, at the time of pronouncing judgment, give notice of his intention to bring the judgment under review, in which case the Lord Ordinary shall dispose of the matter of expenses, and give any interim order that may be necessary, which interim order shall not be subject to review.

and to report to the Lord Ordinary or the Court the factor's failure in duty.

XX. And be it enacted, That the accountant shall, at all times when requisite, report to the Lord Ordinary or the Court any disobedience of any requisition or order, and any misconduct or failure in duty on the part of a factor, or any claims arising against a dismissed factor or a factor's cautioner, or against the representatives of a factor or cautioner deceased; and it shall be competent for the Lord Ordinary or the Court, on the accountant's report, to deal immediately with the matter as accords of law.

When malversation reasonably suspected, a case to be submitted to her Majesty's Advocate.

XXI. And be it enacted, That if the accountant shall possess information that shall lead him on reasonable grounds to suspect malversation or misconduct on the part of the factor, such as may infer removal or punishment, he shall be entitled to lay a case before her Majesty's Advocate, who shall have power to direct such inquiry, and to take such proceedings by petition and complaint or otherwise as he shall think proper.

Provision as to factories constituted before the passing of the Act.

XXII. And be it enacted, with regard to all factories subsisting at the date of the passing of this Act, That if no inventory and rental has been lodged in terms of the aforesaid Act of Sederunt, the factor shall forthwith, after the passing of this Act, lodge a rental, list of funds, and inventory of moveables in manner provided by this Act, and the same shall be adjusted and signed as also hereinbefore provided; and if his accounts shall be in arrear, he shall forthwith lodge the same, with the vouchers, in the manner provided by this Act, and the accountant shall audit his accounts in so far as not already audited; and the factor shall, in reference to all monies which may come into his hands after the passing of this Act, consign the same in bank, in manner and under the penalties herein provided; and in reference to any balance which may be in his hands at the date of the passing of this Act, he shall consign the same in bank at latest before the first day of *June* one thousand eight hundred and fifty, after which date the provisions of this Act for consigning money shall apply to such factor in all respects; and in all other respects the whole provisions of this Act shall take effect from and after the passing thereof, in regard to factories constituted before the passing of this Act, in so far as the same admit of application thereto.

Provision as to past factories informally settled or desperate.

XXIII. And be it enacted, in regard to all factories constituted before the passing of this Act, That any settlement made of any such factory, though informal, shall be held as a *prima facie* discharge to the factor, and the accountant shall not report the same as a subsisting factory, or require further proceedings therein, but reserving the right of all parties interested in the estate to show cause to the accountant or the Court why

such settlement should not be held as a discharge to the factor, in which case, if the cause shown shall be satisfactory to the accountant or the Court, the factory shall be held as subsisting and be proceeded with; and in any such factory in which, though there has been no settlement, it shall appear that no benefit is likely to be derived by the parties interested in the estate from further proceedings therein, and no party interested shall make appearance and require such proceedings, the accountant shall place amongst the papers connected with the estate a memorandum of the circumstances, and shall state in his report that further proceedings are for the present unadvisable.

Power to Treasury to appoint additional clerks to bring up arrears.

XXIV. And whereas there is at present a great arrear in auditing the accounts of judicial factors in the factories now existing, and it may be beyond the power of the accountant to bring up such arrear with the aid only of his ordinary establishment: Be it enacted, That it shall be lawful for the Commissioners of her Majesty's Treasury, or any three or more of them, to appoint such additional clerks as may be required for that purpose, but during such time only as such additional assistance shall be required for such purpose, and to permit such clerks to be remunerated out of the fee-fund hereby established, by salary or otherwise.

Provisions of the Act made applicable to tutors of law, tutors-dative, and curators to insane persons.

XXV. And be it enacted, That except as to the mode of appointment and caution, the provisions of this Act relating to judicial factors, or relating to the office, powers, and duties of the accountant appointed by this Act shall be applicable, in so far as the same admit of application, to every person who, after the passing of this Act, shall be served tutor of law to any pupil, or appointed tutor-dative to any pupil or insane person or idiot, or served curator to any insane person or idiot.

Bonds of caution for tutors and curators.

XXVI. And be it enacted, That from and after the passing of this Act, in every service of a person as tutor of law to a pupil, or as curator to an insane person or idiot, there shall, besides the obligations usually inserted therein, be inserted in the bond of caution taken by the clerk in such service an obligation to observe and perform every duty incumbent on such person, in terms of the rules prescribed or to be prescribed for the discharge of his office in all respects, together with a consent to registration in the books of Council and Session for execution; and such bond of caution shall be transmitted, with the other steps of procedure, to the Director of Chancery, who shall forthwith transmit the same to the accountant; and no extract of the retour in such service shall be given out, nor any letters of tutory or curatory be issued thereon, until such bond of caution shall have been received by the Director of Chancery; and in bonds of caution to be taken in the Court of Exchequer from tutors-dative to pupils or insane persons or idiots there shall, besides the usual obligations, be inserted an obligation to the effect aforesaid; and such bonds of caution shall remain in the Court of Exchequer, according to the rules of that Court.

Amount of caution for factors, etc., may be limited, and bonds of caution by

XXVII. And be it enacted, That it shall be lawful for the Court of Session or Court of Exchequer, as the case may be, to limit, upon cause shown, the caution to be found by factors and tutors and curators to a specified amount, and also to authorize, if they shall deem it expedient, bonds or policies of the *British* Guarantee Association, or other public

Remuneration and responsibility of factors and curators not altered.

XXXII. And be it enacted, That nothing herein contained shall be held to confer on any such tutor or curator a right not now existing in law to remuneration for the discharge of the duties attached to his office, or to limit his powers or alter the rules of his responsibility as by law now existing, excepting in so far as is herein expressly provided.

Power to accountant to require information from banks.

XXXIII. And be it enacted, That the accountant shall have power to require the officers of any bank with which any factor or tutor or curator shall have opened an account for the estate under his care, to exhibit all entries in the books of such bank connected with such estate, and the officers of such bank are hereby required to exhibit the same accordingly, and to allow the accountant to take such copies thereof as he may require.

Discharge of factors, tutors, and curators.

XXXIV. And be it enacted, That it shall be competent for any factor, tutor, or curator, at the termination of his office, to present a petition to the Court for his discharge, calling all persons interested in the estate, so far as known to him, as parties to such petition, and the Court shall order such intimation and service as they may think fit; and it shall be competent to any persons so called, or to any other persons showing right and interest, to appear as parties, and upon cause shown to open up the audit of the factor's accounts, and thereafter, and after receiving the report of the accountant, and making any further inquiry which may be necessary, the Court shall pronounce judgment thereon; and such judgment, if it shall discharge such factor, tutor, or curator, shall be final and conclusive against all parties concerned, though pronounced in absence, provided the same shall not be opened up as a decree in absence in the Court of Session within the time limited for appealing to the House of Lords, or shall not be appealed from within that time.

Accountant to be custodier of bank receipts.

XXXV. And be it enacted, That the accountant shall be the custodier of all bank deposit receipts and other vouchers for sums of money already placed or to be hereafter placed in bank under authority of the Court, and of all judicial bonds of caution and other judicial bonds granted or to be granted under the authority of the Court, or any of the judges thereof, or in reference to the business thereof, and all other documents of a like nature, which, according to the present law or practice, are entrusted to the keeping of the senior principal clerk of Session, who, after the commencement of this Act, shall cease to discharge his present duty as custodier of such documents, and shall transfer all such documents as are in his possession to the accountant; and thereafter the clerk in each process in which consignation is made shall lodge all such bank receipts and bonds or vouchers in the hands of the accountant, whose acknowledgment therefor shall be an acquittance to such clerk.

Records in the accountant's office to be open for inspection.

XXXVI. And be it enacted, That the whole records and papers relating to factories, tutories, and curatories retained in the accountant's office shall be open to inspection on payment of such fees as may be fixed by the Court; but shall remain in the office, and not be lent out unless under authority of the Court or of the Lord Ordinary, and copies therefrom, attested by the accountant, shall have the same authority as the originals themselves, and shall be furnished to any party requiring the same, on payment therefor of such fees as may be fixed by the Court;

and such fees for inspection and attested copies shall be paid weekly by the accountant into the fund hereinafter established.

Banks to accumulate principal and interest on accounts and deposits.

XXXVII. And be it enacted, That from and after the passing of this Act, every bank in *Scotland* with which any money shall have been or shall be deposited or lodged by any judicial factor, tutor, or curator, or under authority of any court in *Scotland*, or with reference to any suit in any court in *Scotland*, whether on deposit receipt or on account current, or otherwise, shall once at least in every year accumulate the interest with the principal sum, so that both shall thereafter bear interest together as principal; and any bank failing so to do shall be liable to account as if such money had been so accumulated.

Provision for accountant's illness or temporary absence.

XXXVIII. And be it enacted, That in case of the illness or temporary absence of the accountant, the Lord President of the Court of Session, or other judge acting as President for the time, may authorize any one of the accountant's clerks or other qualified person to discharge the duties of the accountant for the time.

Establishment of fee-fund.

XXXIX. And be it enacted, That for establishing the fee-fund hereinbefore mentioned, there shall be payable by each estate under charge of a judicial factor, and by each estate of a pupil to whom a tutor of law shall hereafter be served, and by the estate of every pupil, insane person, or idiot to whom a tutor-dative shall hereafter be appointed, and by the estate of every insane person or idiot to whom a curator shall hereafter be served as aforesaid, and by all other estates or parties whom the Court may deem to have benefit from the services of the accountant, such fees as shall from time to time be authorized by the Court, having due regard to the sums required for the purposes of this Act, and to the interests of the estates to be benefited thereby; and such fees shall be lodged by the accountant at least once in every week in that bank in *Edinburgh* which for the time shall be employed by Government to transact its business there; and such fees, with any interest accruing thereon, shall form a fee-fund, out of which the accountant shall draw and pay his own salary and the other salaries herein directed to be paid, and the whole expenses attending his office and duties; and the accountant shall annually exhibit an account of his intromissions with the said fee-fund to the Queen's and Lord Treasurer's Remembrancer of the Court of Exchequer in *Scotland*, who is hereby required to examine and audit such account, and thereafter to submit the same to the Lord President of the Court of Session, with a view to the reconsideration by the Court of the fees then in use to be charged, and such fees shall be so regulated, increased, or diminished by the Court from year to year, or oftener, as to keep up the fee-fund to an amount sufficient for answering the charges thereon, and for providing such reserved fund as may be necessary to meet the current and contingent expenses of the establishment; and any surplus arising on such fee-fund shall be paid over to the said Queen's and Lord Treasurer's Remembrancer, and remain in his hands to meet the future charges on such fee-fund; and the accountant shall enter into bond to her Majesty with surety for his intromissions to the satisfaction of the said Queen's and Lord Treasurer's Remembrancer, and to such amount, and either by a public company or private individual, as to him may seem proper.

Power to pass Acts of Sederunt.

XL. And be it enacted, That it shall be competent to the Court of Session, and they are hereby authorized and required, from time to time to pass such Acts of Sederunt as shall be necessary or proper for the further regulation of the manner of appointing judicial factors, and the manner of discharging their duty, and the manner of discharging the duties of the accountant, and the manner of applying the provisions of this Act to the case of tutors and curators, and the forms of process to be used in pursuance of this Act, and the manner of verifying by affidavit, declaration, certificate, or otherwise, the sufficiency of the caution offered for factors, tutors, and curators, and all other matters requisite for more effectually carrying out the purposes of this Act.

Act may be amended, etc.

XLI. And be it enacted, That this Act may be amended or repealed by any Act to be passed during the present session of Parliament.

ACT OF PARLIAMENT

TO

Regulate the Distribution of Business in the Court of Session in Scotland.—20 *and* 21 *Vict. c.* 56.—[25*th August* 1857.]

WHEREAS it is expedient that provision should be made for the more convenient distribution of the business of the Court of Session, and for diminishing arrears in that Court: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. *Power to the Lord President to take measures for promoting despatch of business.*—It shall be lawful for the Lord President of the Court of Session, from time to time, as it shall appear to him to be necessary or expedient, with a view to promote the due despatch of the business of the Court, to transfer causes from the one Division of the Court to the other, and from any one Lord Ordinary to any other Lord Ordinary, to such extent as he shall judge to be necessary or expedient for the purpose of promoting despatch and preventing delay; and to enable the said Lord President to exercise such power, it shall be lawful for him to require the keepers of the rolls of the respective Divisions, the principal and depute clerks of Session, and the clerks of the several Lords Ordinaries, or any of them, to transmit to him, from time to time as he shall direct, lists of the whole causes depending before such Divisions respectively and the several Lords Ordinaries, and also to attend upon him from time to time, and give such information in regard to such lists, and the state of the business generally, as he may require.

II. *Lord President may order lists to be prepared of causes transferred.*—When the said Lord President shall at any time judge it necessary to transfer causes from the one Division to the other, or from any one Lord Ordinary to any other Lord Ordinary, under the power hereby given, he

shall require to be prepared a list or lists of the causes so transferred; and every such list shall have a title specifying the Division from which, or the Lord Ordinary from whom, and also the Division to which, and the Lord Ordinary to whom, the transference is made, and bearing that such transference is made by the Lord President under the authority of this Act; and every such list shall be dated and subscribed at the end thereof by the said Lord President, and shall be effectual to operate a transference of the causes therein contained in terms of the title thereof, and the causes shall thereafter be held to depend before the Division to which or the Lord Ordinary to whom the transference is made, in the same manner and to the same effect in all respects as if such causes had originally depended before such Division or Lord Ordinary; and it shall be sufficient that the causes shall be entered in the said lists in the same manner in which causes are in use to be entered in the Long Rolls of the Divisions or the Debate Rolls of the Lords Ordinaries: Provided always, that all causes so transferred shall be taken from the causes last enrolled in the order of their enrolment, unless, from connection with any depending action or other similar reason, it may appear proper not to transfer any particular cause.

III. *Lists to be entered in Books of Sederunt, and published.*—Every list of causes transferred by the Lord President as aforesaid shall be entered in the Books of Sederunt, and shall be forthwith printed and published on the walls of the Court, and shall also be published in the Minute Book.

IV. *Summary petitions, etc., how disposed of.*—All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular all petitions and applications falling under any of the descriptions following, shall be so enrolled before and dealt with and disposed of by the junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz.—

1. Petitions and applications under any of the various statutes now in force relative to entails:
2. Petitions and applications under any of the General Railway Acts, or under the Lands Clauses Consolidation (*Scotland*) Act, 1845, or under any local or personal act:
3. Petitions and applications relative to money consigned under any statute or law, subject to the order, disposal, or direction of the Court of Session:
4. Petitions and applications for the appointment of judicial factors, factors *loco tutoris*, or *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration or discharge:
5. All petitions, applications, and reports, under the Act of the twelfth and thirteenth Victoria, chapter fifty-one, intituled *An Act for the better protection of the property of Pupils, absent Persons, and Persons under mental incapacity, in* Scotland.

V. *Lord Ordinary may consult professional persons or persons of science or skill.*—The Lord Ordinary, before whom any such petition, application, or report shall be enrolled or brought, shall have full power to decide on and dispose of the same, after making such investigation and requiring such assistance from professional persons, or persons of science or of skill, as he shall judge proper, and his judgment upon the merits shall be subject to review in manner hereinafter provided; and the judgment of the Lord Ordinary granting or refusing any such petition or application, or disposing of any such report, unless the same shall be brought under review in manner hereinafter provided, shall be equally valid and effectual as a judgment of either Division of the Court to the like effect, according to the present law and practice; and all laws and statutes inconsistent herewith are hereby repealed, to the effect of rendering the provisions of this Act operative and effectual: Provided always, that such Lord Ordinary may in special cases, if he see cause, report such petition or application to the Court, who may thereupon dispose of the same, or give such instructions thereanent to the Lord Ordinary as they may deem proper.

VI. *Review of the Lord Ordinary by interlocutor on merits only allowed.*—It shall not be competent to bring under review of the Court any interlocutor pronounced by the Lord Ordinary upon any such petition, application, or report as aforesaid, with a view to investigation and inquiry merely, and which does not finally dispose thereof upon the merits; but any judgment pronounced by the Lord Ordinary on the merits, unless where the same shall have been pronounced in terms of instructions by the Court on report as herein before mentioned, may be reclaimed against by any party having lawful interest to reclaim to the Court, provided that a reclaiming note shall be boxed within eight days, after which the judgment of the Lord Ordinary, if not so reclaimed against, shall be final.

VII. *Causes may be transferred from the rolls of one Division to the other Division.*—It shall be lawful to the parties to any cause which shall be enrolled, after the 1st day of *November* next, in the rolls of either Division of the Court, by a joint note presented to the Court, to move the Court of consent to transfer such cause from the rolls of the Division in which it is enrolled to those of the other Division, and such cause shall be so transferred accordingly.

VIII. *Court may remit cause to the Lord Ordinary.*—When an issue for the trial of any matter of fact, upon report of the Lord Ordinary, in terms of the Act of the thirteenth and fourteenth years of the reign of her Majesty, chapter thirty-six, shall have been adjusted by either Division of the Court, the Court shall remit the cause to the Lord Ordinary to be further proceeded in: Provided always, that it shall be competent to the parties to give notice of trial in terms of the existing law and practice applicable thereto.

IX. *Sittings of the Court to be extended.*—Provided always, That the ordinary sittings of the Court, both Inner and Outer Houses, shall henceforward be as follows, namely, the Summer Session shall in each year commence on the first lawful day (*Monday* excepted) which shall happen

next after the 11th day of *May*, and shall end on the 20th day of *July*, or, when that day shall fall upon *Sunday* or *Monday*, on the *Saturday* immediately preceding; and the Winter Session shall in each year commence on the first lawful day (*Monday* excepted) which shall happen next after the 11th day of *November*, and shall end on the 20th day of *March*, or, when that day shall fall upon *Sunday* or *Monday*, on the *Saturday* immediately preceding; and it shall not be lawful for the said Court to make an adjournment at the *Christmas* recess for a longer period than fourteen days, any law, statute, or usage to the contrary notwithstanding.

X. *Lord Ordinary on Bills during vacation may dispose of petitions for factors, etc.*—The Lord Ordinary on the Bills during vacation shall have the same powers in regard to petitions for the appointment of factors *loco tutoris*, *curators bonis*, and judicial factors, as are by this Act conferred in relation thereto on the junior Lord Ordinary, as aforesaid.

ACT OF SEDERUNT

Concerning Factors.—[13*th February* 1730.]

THE Lords of Council and Session considering that they have been often applied to for appointing factors on the estates of pupils not having tutors, and of persons absent that have not sufficiently empowered persons to act for them, or, who are under some incapacity for the time to manage their own estates, to the end that the estates of such pupils or persons may not suffer in the meantime, but be preserved for their behoof, and of all having interest therein: Therefore, that such persons may be under due regulations and security, for the faithful and punctual fulfilling of their trust, the said Lords of Council and Session do hereby declare and ordain, That all such factors as aforesaid, appointed and authorized by them, shall be liable to pay and perform as follows:—

1*mo.* Such factor shall be liable for the annual-rents of all rents and profits whatsoever which he shall recover, or by diligence might have recovered; and that from and after the space of one year after the said rents and profits became due, or might have been recovered, as said is, and until he make due payment of the same.

2*do.* Such factor shall, within six months after extracting his factory, make a distinct and special rental of the estate committed to his management, and lodge the same in the hands of the clerk to the act appointing and authorizing him to be factor on the said estate, where it shall lie and be made forthcoming, and the inspection and perusal thereof be allowed unto all persons having interest, without fee or reward, to the end the same may be examined, and the said factor charged thereby, or otherwise, as shall be found just.

3*tio.* When any alteration happens in the said rental, by lowering any part of the rent (which is only to be done according to the rules of law) or by any increase of the same, from improvements or discoveries, or other addition, an account of such alteration shall, within three months

of its happening, be by the said factor put in the hands of the said clerk, in manner and to the ends above mentioned; and if the said rental given in by the factor shall be found deficient, or if he omit to add any increase thereof, he shall be decerned in the double of such deficiency and omission respectively.

4*to*. Such factor shall, once every year, give in a scheme of his accompts, charge and discharge, to the clerk aforesaid, that all concerned may have access to see and examine, and provide themselves with proper means of checking the same, wherein, if the said factor fail, he shall be liable to such a mulct as the Lords of Session shall modify, not being under an half-year's salary.

5*to*. When bonds, bills, notes, or obligations of any sort, for money or effects, are under the factory, the said factor shall make a list or inventory thereof, bearing the names of the creditor and debitor, conveyances thereof, the sum of money, or the thing due, the date, the terms of payment, and the term from whence annual-rent runs, and from whence it is then resting, so far as he can discover; which list and inventory, and an accompt of the alterations that shall happen therein, shall, by the said factor, be put in the clerk's hands respectively, at the times, to the ends, and in manner, and under the certifications respectively aforesaid.

6*to*. If corns, cattle, outsight or insight plenishing, or moveables of any sort, shall be under the factory, the said factor shall make inventary thereof, expressing all the particulars, and the quantity and quality, or condition of the same; which inventary, and an accompt of such alterations as shall happen therein, expressing whence the alteration arose, and the price or value got for any of the said moveables that have been disposed of, shall likewise be put in the said clerk's hands respectively at the time, to the ends, and in manner, and under the certifications respectively aforesaid; and the said factor shall be obliged to manage such obligations for money or effects, and to manage or dispose of such moveables according to the rules of law, and as prudence requires, for the benefit of the proprietor, and all having interest.

7*mo*. Where it is necessary by law that such money, or effects, or moveables should be confirmed, the said factor may confirm the same in his own name as executor-dative, and as factor appointed by the Lords of Council and Session, on the estate of such a person, and for the use and behoof of the said person, and of all that have or shall have interest, unless some other person having a title offer to confirm, and shall put in the said clerk's hands a just and full copy of the said testament, and of all eiks he may afterwards make thereto, within the space of three months after the confirmation, and that under the penalty of such a mulct as the said Lords shall modify.

8*vo*. Such factor shall have power to grant tacks or leases, to continue during all the time that the estate set in tack shall remain under the inspection of the said Lords of Session, and for one year further.

9*no*. Such factor shall make payment of his intromissions to such person or persons, and at such times, as the said Lords shall, in the factory or otherwise, appoint.

10*mo*. If the factor fail in any part of the premises, it shall be a ground

of removing him, without prejudice of the several particular certifications aforesaid.

11*mo.* In the bond of cautionry for such factor, he and his cautioner shall be bound conjunctly and severally, and be obliged for the said factor's observing the rules and instructions appointed and ordained by this Act, or that he shall be otherwise liable to in law.

12*mo.* This Act shall extend to all factors to be henceforth appointed and authorized by the said Lords, except such factors as are regulated by former Acts of Sederunt. And the Lords ordain this Act of Sederunt to be recorded in the Books of Sederunt, and printed and published in the ordinary manner.

ACT OF SEDERUNT

In Pursuance of the Statute for the better Protection of the Property of Pupils and others.—[11*th December* 1849.]

THE Lords of Council and Session, in pursuance of the powers vested in them by the Act of Parliament, passed in the twelfth and thirteenth year of her present Majesty's reign, chapter fifty-one, intituled *An Act for the better protection of the property of Pupils, absent Persons, and Persons under mental incapacity in Scotland*, do hereby enact and declare as follows:—

1. That every petition to be presented to either Division of the Court of Session for the appointment of any factor *loco tutoris*, factor *loco absentis*, or *curator bonis*, shall, when boxed to the judges and clerk of process, be also boxed to the Accountant of the Court of Session, and unless marked by the boxing clerk as duly boxed, shall not be received by the clerk.

2. That, when not otherwise expressed in the interlocutor appointing a factor or curator on such petition, the time for finding caution shall be one calendar month from the date of such appointment; the Court hereby reserving power, on cause shown, by application made at any time before expiry of that month, to prorogate the time for finding caution.

3. That all applications for special powers by factors or *curators bonis* foresaid, or by tutors or curators coming within the provisions of the Act, shall be made to the junior Lord Ordinary in the manner and form prescribed or permitted by the 7th and 8th sections of the statute; and the Lord Ordinary shall, before reporting such applications to the Court, order such intimations to be made as he may deem proper, and may report the same, either with or without ordering the papers to be printed and boxed to the Court, as the circumstances may require.

4. The principal clerks of Session are authorized and directed to transmit to the accountant at all times on his requisition the proceedings, or such part thereof as he may require, in all processes of judicial factory, or other processes embraced by the said Act, whether depending now or to depend hereafter, in so far as such proceedings may not be required for the use of the Court; and the senior principal clerk of Session is

hereby authorized to transmit to the accountant, the principal return made by the clerks of Session to the Court regarding judicial factories, dated on the 31st day of January 1849.

5. That the bond of caution to be lodged for any factor *loco tutoris*, or factor *loco absentis*, or *curator bonis* shall be forthwith transmitted by the clerk of process to the accountant, and the factory shall be entered in his books.

6. That upon the issuing of any gift of tutory-dative the Queen's and Lord Treasurer's Remembrancer shall forthwith transmit a copy of the bond of caution to the accountant, who shall enter the appointment in his books.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be printed and published in the usual manner.

(Signed) D. Boyle, *I.P.D.*

ACT OF SEDERUNT

For regulating the Fees to be received by the Accountant of Court, under the Statute for the better protection of Pupils and others.—[1*st February* 1850.]

The Lords of Council and Session, in pursuance of the powers vested in them by the Act of Parliament passed in the twelfth and thirteenth year of her present Majesty's reign, chapter fifty-one, intituled *An Act for the better protection of the property of Pupils, absent Persons, and Persons under mental incapacity in Scotland*, do hereby enact and declare as follows:—

1. That, until further provision shall be made, in regard to the fees to be exacted by the accountant, he shall be entitled to levy fees not exceeding those stated in the subjoined table, and as much less as the case may require in respect of the value or other circumstances of the individual estate, and also in respect of the state of the fee-fund; the fees for auditing accounts being in each case chargeable, according to what may be just, but within these limits and under the sanction of the auditor of Court, and being subject to a right of objection on the part of the factor, or tutor, or curator, or any party interested in the estate, by a note of objections to that Division of the Court to which the case may belong.

2. But in all cases where the accountant shall be of opinion that a higher fee should be charged, he shall report that matter to the Lord Ordinary or the Court, who shall have power to decide thereon. And where the fee of auditing an account, or any other fee, has been increased or occasioned by the factor's fault, the accountant shall diminish the factor's fee to the extent of such loss; or where the circumstances do not admit f this, and the factor does not indemnify the estate voluntarily for such loss, the accountant shall report the matter to the Court.

And the Lords appoint this Act of Sederunt, and relative Table of

Fees to be recorded in the Sederunt Book, and printed and published in the usual manner. (Signed) D. BOYLE, *I.P.D.*

TABLE *of the highest amount of Fees to be charged by the Accountant, unless under special authority in each case from the Lord Ordinary or the Court.*

Head 1st.—Fees on lodging Papers.

Fee on lodging rental, ...	£0	2	6
Fee on lodging account and vouchers, . . .	0	2	6
Fee on lodging application for special powers, or other paper not above mentioned, ...	0	2	6
Fee on lodging receipts for consigned money, . .	0	2	6

Besides 1s. for each £100 of the amount, but the fee not to exceed in all £2, 2s.

Head 2d.—Fees for Searches and delivering up or exhibiting Documents.

For each search for a bond, rental, or other document, a fee of	£0	5	0
For each search of the records of subsisting or of new factories, or any information therein contained, .	0	2	6
For exhibition or delivery of bank receipts, under warrant of the Court, etc., ...	0	2	6

And 1s. for each £100 of money uplifted, but not to exceed in all £2, 2s.

Head 3d.—For Copies of Papers.

2s. 6d. for the first sheet, besides the ordinary copying fees, as specified in the Act of Sederunt, 19th December 1835.

Head 4th.—For Audits.

For auditing each account, a fee of . . .	£0	10	6

Besides not more than seven per cent. on the factor's commission as allowed; or in case there is no factor's commission allowed, or less than full factor's commission, then not more than seven per cent. on what would have been the factor's commission, if chargeable and fully allowed.

Head 5th.

Report on applications for final discharge, . .	£0	10	6

And where the yearly revenue of the estate is above £500, then £1, 1s. This to be exclusive of fees of audit.

Head 6th.

Report on application for special powers in ordinary cases, and other reports, ...	£0	10	6

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